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# You Can't Common What You Can't See: Towards a Restorative Polycentrism in the Governance of our Cities

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# **YOU CAN'T COMMON WHAT YOU CAN'T SEE: TOWARDS A RESTORATIVE POLYCENTRISM IN THE GOVERNANCE OF OUR CITIES**

*Amy Laura Cahn & Paula Z. Segal\**

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### INTRODUCTION

“Commons” emerge out of and are enacted through sustained patterns of local use, through collective actions that give life to and re-assign the roles of urban spaces, and through individual investments of time, love, and energy.<sup>1</sup> Such management practices are voluntary, adaptive, inclusive, and available to all.<sup>2</sup> Creating commons—or commoning—makes place out of space, while asserting the “right to *not* be excluded” from the use of that place.<sup>3</sup>

A commons emerges not just within the city, but as the city itself. Cities are spaces that are intensely used and invested-in by millions of people, transformed from simply locations on a map into places with value through collective creative action. In the words of Sheila Foster and Christian Iaione, the city is “a shared resource that belongs to all of its inhabitants.”<sup>4</sup> It draws its “wealth . . . from the collective actions of [those] inhabitants.”<sup>5</sup>

Use of shared resources is often the source of tension. The city is no exception<sup>6</sup> and a city’s most marginalized residents often have the least acknowledged claim to place and urban space.<sup>7</sup> The framework of *the city*

1. Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17 SOC. & LEGAL STUD. 311, 320 (2008).

2. *Id.* (citing I. Angus, *Substance as a Social Right: A Political Ideal for Socialism?*, 65 STUD. POL. ECON. (2001)).

3. Blomley, *supra* note 1, at 320 (emphasis in original). See generally C.B. MACPHERSON, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS (C.B. Macpherson ed. 1978).

4. See Sheila Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL’Y REV. 1, 6 (2016), <http://ssrn.com/abstract=2653084> [<https://perma.cc/B5WM-DJQ5>].

5. *Id.* at 50.

6. *Id.*

7. See Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595,

as commons provides a framework to respond to the question “who owns the city?”<sup>8</sup> at a moment when the additional issues of “who should have the benefit of the city?” and “what kind of city it should be?”<sup>9</sup> are deeply contested.

There are limits to the urban commons frame. Yet, as Foster and Iaione have discussed, “what the commons can do, both legally and conceptually, is to stake out the claim that some socially produced common goods are as essential to communities as water and air and thus should be similarly protected.”<sup>10</sup>

In this Article, we contend that we must recognize and protect the commons not simply because the commons resources themselves are essential. First, it is *just* to ensure that the value that is created through commoning is not captured by private market actors to the exclusion and/or detriment of the residents who create that value. Second, being able to see what is a common is key to maintaining access to and enhancing the use of essential resources.<sup>11</sup> And finally, making visible and protecting places created through processes of commoning are equitable (re)distributive responses to a history of race-based divestment and neglect.

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1648-57 (1995) (noting that much of the discrimination against Blacks can be attributed to the fact that there is a property right in “whiteness” that poor whites maintain and protect through the enforcement of residential segregation); Becky Lundberg Witt, *Urban Agriculture and Local Government Law: Promises, Realities, and Solutions*, 16 U. PA. J.L. & SOC. CHANGE 221, 221 (2013) (noting that city officials publicly promote urban agriculture while creating structures that make it more difficult and expensive for the farms to remain permanent).

8. Foster & Iaione, *supra* note 4, at 1 (citing Saskia Sassen, Who Owns Our Cities – and Why This Urban Takeover Should Concern Us All, THE GUARDIAN (Nov. 24, 2015), <http://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all> [<https://perma.cc/AH5Y-5EKK>]).

9. Peter Marcuse, *From Critical Urban Theory to the Right to the City*, 13 CITY 185, 192 (2009).

10. Foster & Iaione, *supra* note 4, at 28.

11. Contrary to assumptions rooted in Garrett Hardin’s work, *The Tragedy of the Commons*, 162 SCI., NEW SERIES 1243, 1248 (Dec. 13, 1968), <http://www.jstor.org/stable/1724745>, visibility need not lead to over-exposure or over-use, but can meaningfully “enhance the value of the resource and the activity taking place within it.” See Foster & Iaione, *supra* note 4, at 11 (citing Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986)).

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When Mrs. Mabel Wilson<sup>12</sup> moved to South Philadelphia's 2500 block of Alter Street in Grays Ferry, in 1928, she did not set out to become an urban farmer. But by the 1930s and 40s, many of Mrs. Wilson's Alter Street neighbors had died or fled the neighborhood, leaving their empty homes behind.<sup>13</sup> As these empty structures became dangerous to surrounding properties, the City of Philadelphia demolished them, one by one. Each left behind an abandoned parcel.<sup>14</sup> Thanks to the leadership of Mrs. Wilson, neighbors gathered together to transform each of those parcels into green and garden spaces, many of which have survived, if tenuously, until this day. For several generations, these spaces have been integral as the neighborhood's commons.

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*Urban "commoning"*<sup>15</sup> includes those who create the value of places by the use, distribution, and management of increasingly valuable places, from the scale of the single parcel to the scale of the city itself. The land stewards in our cities might not call them "commons," but for places that are not formally recognized, commoning offers a more just alternative to market allocation and public ownership, as well as a response to the private and public owners who originally divested from these spaces.<sup>16</sup>

Today, Philadelphians speak of 40,000 parcels like the abandoned ones on Alter Street. They are distributed throughout the city and concentrated in areas associated with historic disinvestment—low-income neighborhoods and neighborhoods home to predominantly Black, Puerto Rican, and immigrant communities.<sup>17</sup> To municipal officials and

12. See e.g., Joseph Myers, *Taxing Times at Central Club*, S. PHILLY REV. (June 7, 2012), <http://www.southphillyreview.com/2012/jun/7/Taxing-times-at-Central-Club-157601275/> [https://perma.cc/CD6F-7APL].

13. Defendant's Petition to Stay Execution of The Sheriff's Sale of Real Property Or, In The Alternative, To Postpone Sheriff's Sale, U.S. Bank v. David May, (May 1, 2012), [http://www.pilcop.org/wp-content/uploads/2012/06/petition-mays2540\\_2.pdf](http://www.pilcop.org/wp-content/uploads/2012/06/petition-mays2540_2.pdf) [https://perma.cc/TU9T-TKBD].

14. *Id.*

15. Peter Linebaugh, *Some Principles of the Commons*, COUNTERPUNCH (Jan. 8, 2010), <http://www.counterpunch.org/2010/01/08/some-principles-of-the-commons> [https://perma.cc/5UR5-73BE].

16. Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 FORDHAM URB. L.J. 247 (2016).

17. Karen Black, *Philadelphia Achieves Land Bank Through Compromise*, SHELTERFORCE (Jan. 22, 2014), [http://www.shelterforce.org/article/3575/philadelphia\\_achieves\\_land\\_bank\\_through\\_compromise](http://www.shelterforce.org/article/3575/philadelphia_achieves_land_bank_through_compromise) [https://perma.cc/H8FC-4WJK]. See generally Patrick Kerkstra, PLANPHILLY, *Special Report: The Delinquency Crisis* (Aug. 13, 2011), <http://planphilly.com/articles/2011/08/13/special-report-delinquency-crisis> [https://perma.cc/QX7T-9JVG].

developers, these parcels became unproductive land resources once the owners of record faded from view.<sup>18</sup> Abandoned parcels are called “vacant,”<sup>19</sup> but, in fact, so many are not actually empty.

Community-stewarded spaces, like community gardens, farms, and parks, have historically emerged as a direct response to abandonment, filling vacancy with neighborhood life. Located in historically marginalized neighborhoods, governed and managed without the benefit of external resources, and functioning without clear pathways to ensure legal tenure, land stewards often must operate tenuously on the edge of trespass and outside of traditional notions of private property ownership.<sup>20</sup>

The “commons” is best understood as a set of collective interests that support collective rights.<sup>21</sup> Commons are less about the *use of the resource*,<sup>22</sup> more about *the right to the resource*.<sup>23</sup> Yet, a community’s rights to commons in the form of these places<sup>24</sup> are often not honored by outside forces. Further, a community’s lack of clear rights is linked to and reinforced by the persistent lack of visibility for the common rights that emerge through use. Municipal governments often do not “see” these spaces or their creators, even as government holds legal title to the land or manages the property registration system that allows another absent entity or individual to hold title.

Invisibility heightens the risk that community-stewarded spaces will be sold and the community ejected while outside actors capture and profit from the value created through the loving labor of residents. As urban space is transformed into a commodity, whether it be through sale of a parcel or the value accrued by surrounding properties, these community

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18. *Community Life Improvement Programs: Vacant Lot Program*, CITY OF PHILA. (Jan. 21, 2016), <http://www.phila.gov/qualityoflife/vacantlotprogram/Pages/default.aspx> [https://perma.cc/3Q4R-84HA].

19. Alex Zimmerman, *Property Control: Neighborhood Groups Wary of Land-Bank Bill*, PITT. CITY PAPER (Feb. 5, 2014), <http://www.pghcitypaper.com/pittsburgh/property-control-neighborhood-groups-wary-of-land-bank-bill/Content?oid=1727488> [https://perma.cc/6R23-GFPP].

20. See e.g., Jessica Owley & Tonya Lewis, *From Vacant Lots to Full Pantries: Urban Agriculture Programs and the American City*, 91 U. DET. MERCY L. REV. 233, 237 (2014).

21. Blomley, *supra* note 1, at 320.

22. Garrett Hardin’s pasture is not the most strategic or accurate depiction of the “commons.” See generally, Hardin, *supra* note 11.

23. See generally DAVID HARVEY, *The Creation of the Urban Commons*, in REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION 67, 73 (Verso ed. 2012); Blomley, *supra* note 1; Marcuse, *supra* note 9.

24. As opposed to ones held in explicit community structures such as community land trusts or designations of preserved open space or parkland.

spaces become the places where “enclosure”—land insecurity brought on by a market interest—is felt most directly.<sup>25</sup>

In this Article, we describe the mechanisms through which the community-generated wealth accumulated in our neighborhoods via community-stewarded open spaces is enclosed: captured by the market and made inaccessible to land stewards. And we present some legal and community organizing strategies to resist this enclosure. In Part I, we discuss community-managed open spaces in American cities in the context of the racialized history of twentieth-century urban space. In Part II, we explore the dimensions of invisibility that put these spaces at risk of transformation into market commodities. In Part III, we describe interventions that allow the creators of common wealth to resist its enclosure. And in Conclusion, we draw from those interventions a set of guidelines with which to move forward with accountability and in service of social justice.

## I. COMMUNITY LAND STEWARDS IN THE TWENTIETH CENTURY NORTH AMERICAN CITY

### A. Why Garden?

The existence of [vacant] areas constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and constitutes a negative influence on

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25. The historical enclosure of the commons that serves as a departure for much of commons scholarship is a physical place: a pasture in the center of English towns and woodlands at their periphery that landless peasants relied upon as crucial places to grow food for their families, collect firewood, and graze any livestock they owned for meat and milk. The enclosure of that commons was done quite literally: by evicting the peasants and fencing the land to divide it and facilitate treating formerly commonly-accessible sites as private property. See Linebaugh, *supra* note 15. This enclosure is iconic in the commons literature chiefly because of resistance to it by an ideologically-motivated group of landless peasants calling themselves “The Diggers,” who refused to respect eviction orders and defiantly cultivated the formerly common lands, until they too, were driven out. Luckily for generations of scholars, they narrated their own struggle and published a pamphlet. See generally *A Declaration From the Poor Oppressed People of England* (1649), <http://www.bilderberg.org/land/poor.htm> [<https://perma.cc/KW92-EGBV>]. In the context of the city as commons, enclosure is any privatization of resources that have been or should be publicly accessible. When applied to land-based resources (community parks, gardens, farms), this privatization is enclosure both literally (fences, eviction) and by analogy (the capture of publicly-created value by private actors who can then trade it as a commodity). See e.g., Foster & Iaione *supra* note 4, at 23-24 (discussing the “capture [of] the ‘unearned increment’”).

adjacent properties impairing their economic soundness and stability, thereby threatening the source of public revenues.<sup>26</sup>

Gardens and other community-managed spaces are products of a racialized history of urban space. Concentrations of abandonment and properties left in legal limbo burden already burdened places. What we refer to now as “vacant land” is the legacy of racial segregation,<sup>27</sup> redlining,<sup>28</sup> and urban renewal,<sup>29</sup> and more recently exacerbated by predatory lending,<sup>30</sup> the ensuing mortgage foreclosure crisis, and new discriminatory practices in access to credit.<sup>31</sup> For decades, municipal and private landowners have left acres of land in neighborhoods like Grays Ferry abandoned in cities across the Rust Belt and in the Northeast.

The massive abandonment of individual properties in the mid-twentieth century was not coincidental, but part of a multi-faceted national housing policy that incentivized suburban and ‘greenfield’ housing development and purposely dis-incentivized investment in urban spaces, further disenfranchising people of color and immigrants. And this has historically been by design—the discriminatory policies and practice of investing in places that feel safe for white people to live relies on a clear separation from neighborhoods where people who are perceived as other than white

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26. N.Y. Gen. Mun. Law § 501.

27. See, e.g., Amy E. Hillier, *Redlining and the Home Owners’ Loan Corporation*, 29 J. URB. HIST. 394, 395 (2003).

28. *Id.*

29. “In 1949, Congress initiated the federal urban redevelopment program, or ‘urban renewal,’ with the passage of Title I of the Housing Policy Act of 1949, which provided resources to the municipal project of ‘blight clearance.’ Title I allocated federal funds so that local redevelopment authorities could buy and clear so-called blighted areas and then sell that land to private developers, using the proceeds to cover public costs.” Amy Laura Cahn, *On Retiring Blight as Policy and Making Eastwick Whole*, 49 HARV. C.R.-C.L. L. REV. 450, 456 (2014); see also Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 354 (2000) (citing Robert Putnam, *Bowling Alone*, 6 J. DEMOCRACY 65, 67 (1995) (discussing the “high cost” of “slum clearance policy” on “existing social capital”)).

30. David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. 21, 24 (citing Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High Cost Lending*, 36 FORDHAM URB. L.J. 361 (2009)).

31. Anna Clark, *The Threat to Detroit’s Rebound Isn’t Crime or the Economy, It’s the Mortgage Industry*, NEXT CITY (Dec. 7, 2015), <https://nextcity.org/features/view/detroit-bankruptcy-revival-crime-economy-mortgage-loans-redlining> [<https://perma.cc/B34V-J947>] (“In all but a handful of Detroit neighborhoods, you better have cash on hand for both the purchase price and the tens of thousands of dollars of rehab work. Loans here are nearly impossible to find.”).



live.<sup>32</sup> As a result, voids emerge where concentrated poverty and a lack of critical resources come together in urban centers.<sup>33</sup>

One of the starkest examples of disinvestment is known as redlining. In urban centers nationwide, a Home Owners' Loan Corporation (HOLC) ratings were just one manifestation of the massive systemic barriers created to prevent Black families from obtaining access to credit and fire insurance.<sup>34</sup> Mortgage and insurance companies denied residents the resources needed to purchase and protect homes.<sup>35</sup> Lines on the HOLC maps explicitly congealed value in certain areas, areas inaccessible to certain residents based on their race. The dividing lines had direct impact on whether Black—as well as, immigrant—families have had access to acquire and maintain wealth via property ownership.<sup>36</sup> And often, as a direct result, they did not.

To make matters worse, lack of individual financial resources created further barriers to “active ownership,” when family members could not afford to probate an estate or take other necessary steps to transfer and/or maintain clear title. But that lack of capital was, again, just a symptom of a system built to obstruct Black families building wealth.<sup>37</sup>

Redlining was only one in a host of factors that spurred disinvestment, population loss, vacancy, and a systematic denial of wealth building to nonwhite families concentrated in particular geographic areas.<sup>38</sup> The same neighborhoods that were denied access to credit via HOLC policies were later declared “blighted”<sup>39</sup> and subjected to slum clearance.<sup>40</sup> And just a

32. Camille Z. Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOCIOLOGY 167, 198 (2003).

33. See e.g., *id.* at 168; John A. Powell, *Whiteness and Spatial Racism: Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL'Y 45 (2005), [http://racism.org/index.php?option=com\\_content&view=article&id=397:whoteness15aa&catid=69&Itemid=165](http://racism.org/index.php?option=com_content&view=article&id=397:whoteness15aa&catid=69&Itemid=165) [https://perma.cc/S2KT-AQBQ].

34. See Hillier, *supra* note 27, at 420.

35. Anne Whiston Spirn, *Restoring Mill Creek: Landscape Literacy, Environmental Justice and City Planning and Design*, 30 LANDSCAPE RES. 395, 399 (July 2005).

36. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (May 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/> [https://perma.cc/4KGF-C5MZ].

37. *Id.*

38. Foster & Iaione, *supra* note 4, at 19 (citing Georgette C. Phillips, *Zombie Cities: Urban Form and Population Loss*, 11 RUTGERS J.L. & PUB. POL'Y 703 (2014)).

39. See *supra* note 29. See also Wendell Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 2 YALE L. & POL'Y REV. 1, 14 (2003); cf. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 310–11 (2004).

40. For New York City, compare maps of HOLC lines with urban renewal areas at *urbanreviewer.org* [https://perma.cc/QZ9G-XKC4].

few decades later, those same neighborhoods became the direct target of the sub-prime lending market.<sup>41</sup>

These phenomena perpetuate ongoing inequity. These are the neighborhoods where foreclosures are now concentrated,<sup>42</sup> where vast numbers of people pay more than 50% of their income in rent,<sup>43</sup> and where renters most often find themselves in housing court.<sup>44</sup> These are the neighborhoods where effects of mass imprisonment are felt disproportionately;<sup>45</sup> the neighborhoods to and from which you might have to take a bus because the subway does not reach there;<sup>46</sup> the neighborhoods where few hospitals ever opened and where those that did are closing;<sup>47</sup> the neighborhoods with few grocery stores;<sup>48</sup> and the places overburdened with

41. Compare *id.*, with Deyanira Del Rio, *Mortgage Lending and Foreclosures in Immigrant Communities: Expanding Fair Housing and Fair Lending Opportunity Among Low Income and Undocumented Immigrants*, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY OF THE OHIO STATE UNIVERSITY (2010), [http://www.kirwaninstitute.osu.edu/reports/2010/02\\_2010\\_ForeclosuresandImmigrantComm\\_DelRio.pdf](http://www.kirwaninstitute.osu.edu/reports/2010/02_2010_ForeclosuresandImmigrantComm_DelRio.pdf) [https://perma.cc/MF6A-NF7U].

42. See, e.g., Matthew Bloch & Janet Roberts, *Mapping Foreclosures in the New York Region*, N.Y. TIMES (May 30, 2010), <http://www.nytimes.com/interactive/2009/05/15/nyregion/0515-foreclose.html>.

43. See e.g., CMTY. SERV. SOC'Y & UNITED WAY OF N.Y.C., *Renters in Most Low-Income Neighborhoods Face Very High Rent Burdens*, in MAPPING POVERTY IN NEW YORK CITY: PINPOINTING THE IMPACT OF POVERTY, COMMUNITY BY COMMUNITY 7 (2005), [http://www.cssny.org/userimages/downloads/Mapping\\_booklet.pdf](http://www.cssny.org/userimages/downloads/Mapping_booklet.pdf) [https://perma.cc/7Z74-QBU8].

44. See *id.* at 9; NATIONAL VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES (Aug. 2005), <http://www.smartgrowthamerica.org/documents/true-costs.pdf> [https://perma.cc/6ACC-Z274].

45. As an example, the neighborhood of Brownsville, in Brooklyn's 16th Community District, is home to Brooklyn's highest proportion of residents living below the federal poverty line. The residents who live in District 16 are nearly all people of color. During 2003, one in twenty adult men in the district was admitted to jail or prison (not counting those living in the District who are on parole, probation, or other community supervision). Even more troubling, one in twelve young men between the ages of sixteen and twenty-four go to either prison or jail from this District every year. See *Justice Atlas of Sentencing and Corrections*, NEW YORK, JUSTICE MAPPING CENTER, <http://www.justiceatlas.org/>.

46. See ONNYTURF, *NYC Subway Map*, <http://www.onnyturf.com/subway/>. This is a subway map overlaid on a Google map showing the gaps in service that the MTA map's distortion hides. See also AMERICAN COMMUNITY SURVEY, MEAN TRAVEL TIME TO WORK OF WORKERS 16 YEARS AND OVER WHO DID NOT WORK AT HOME (2008), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_GCT0801.US01PR&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_GCT0801.US01PR&prodType=table) [https://perma.cc/PV6Z-4ZUL?type=image].

47. See Dennis Osorio & Angeline Thomas, *The Health Equity Challenge: People of Color are Living Sicker and Dying Younger in California*, NW. FED'N COMMUNITY ORGANIZATIONS (2009), [http://allianceforajustsociety.org/wp-content/uploads/2010/04/2009-0622\\_Health-Equity-Challenge.pdf](http://allianceforajustsociety.org/wp-content/uploads/2010/04/2009-0622_Health-Equity-Challenge.pdf) [https://perma.cc/9RYC-EKQ8].

48. See e.g., *Unshared Bounty: How Structural Racism Contributes to the Creation and Persistence of Food Deserts*, ACLU RACIAL JUST. PROGRAM (June 2012),

the industry and trash incinerators that destroy a community's health, but without the parks that enhance it.<sup>49</sup> These are also the neighborhoods where the majority of the nation's poor people and people of color live<sup>50</sup> and where life expectancy might be twenty years shorter than more affluent neighborhoods.<sup>51</sup> And they are the neighborhoods where current forces continue to disinvest in current manifestations of redlining<sup>52</sup> and predatory lending and where gentrification and displacement are vigorously knocking at the gates.<sup>53</sup>

The same communities that shouldered the burdens of generations of market abandonment and municipal neglect are now at-risk of wholesale displacement due to renewed interest in urban space as real estate.

In the face of such forces: why garden?

People living in marginalized communities build gardens, parks, and farms as just one strategy to invest in the infrastructure and social structures of their neighborhoods when faced with huge resource gaps. A Furman Center comparison of New York City census tracts bears out this

<http://www.racialjusticeproject.com/wp-content/uploads/sites/30/2012/06/NYLS-Food-Deserts-Report.pdf> [<https://perma.cc/SPK9-PQZ9>].

49. See generally *Parks, Playgrounds & Open Space Layers of OASIS Interactive Map of New York City*, OASIS NYC, <http://www.oasisnyc.net/map.aspx> [<https://perma.cc/HS2X-NTLF>]; ROBERT GARCÍA & SETH STRONGIN, *HEALTHY PARKS, SCHOOLS AND COMMUNITIES: MAPPING GREEN ACCESS AND EQUITY FOR SOUTHERN CALIFORNIA* POLICY REPORT (2011); RICHARD FREEH & SARAH WU, *MAYOR'S OFFICE OF SUSTAINABILITY, GREENWORKS PHILADELPHIA 2015 PROGRESS REPORT* (Elise Vider Editorial Services 2015), <http://www.phila.gov/green/PDFs/Greenworksprogressreport.pdf> [<https://perma.cc/Q9U6-JZL8>].

50. *Vacant and Abandoned Properties: Turning Liabilities into Assets*, EVIDENCE MATTERS (Winter 2014), <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html#title> [<https://perma.cc/LP2Z-7KXT>]; SUSAN WACHTER ET AL., *REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA: LAND USE AND POLICY STUDY*, at iv (2010), <http://pennur.upenn.edu/uploads/media/urban-agriculture-final-report.pdf> [<https://perma.cc/R5G6-9QKR>] (stating that 77 percent of 2500 Philadelphia Redevelopment Authority parcels were "in Census tracts with median household incomes of less than \$25,000").

51. Virginia Commonwealth University Center on Society and Health, *Mapping Life Expectancy: Philadelphia* (April 6, 2016) <http://www.societyhealth.vcu.edu/work/the-projects/mapsphiladelphia.html>. ("[B]abies born in Philadelphia zip codes only five miles apart face up to a 20-year difference in life expectancy.").

52. See e.g., Clark, *supra* note 31 ("In all but a handful of Detroit neighborhoods, you better have cash on hand for both the purchase price and the tens of thousands of dollars of rehab work. Loans here are nearly impossible to find.").

53. John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *HOW. L.J.* 433, 436-37 ("Commonly, higher-income white households replace lower-income minority ones, often in the very same neighborhoods that experienced 'white flight' and urban renewal in the 50s and 60s. Where there is displacement then gentrification can be seen as a double insult—a "one-two" knock-out of urban dwellers of color.").

fact: census tracts with gardens were poorer than those in neighboring tracts that do not have them (poverty rate of 36.7% versus 18.8%), have a lower homeownership rate (12.7% versus 31.5%), a higher unemployment rate (13.2% versus 8.1%), and are disproportionately home to Black and Hispanic residents (81.6% versus 43.9%).<sup>54</sup> The Furman authors call these neighborhoods “distressed,”<sup>55</sup> one of many terms imposed on neighborhoods to which resources have been denied. But that term, like “blight,” masks the origins of that distress and dismisses the community actions to address it.

Since at least World War II, residents of these neighborhoods left behind have filled the voids by creating gardens, parks, and farms.<sup>56</sup> Individuals and groups of people physically stepping in and taking over these left-behind “surplus” places is a demonstration of resistance and a positive corollary to historic injustice.<sup>57</sup>

### B. Are Community Gardens “Commons”?

Over time, community gardeners and other stewards have changed the nature of the real property they use, creating a common resource from property to which the city or another entity holds title.<sup>58</sup> Neighbors labor to create places of meaning out of neglected land. A community garden is not simply a place where residents cultivate food—it is an embodiment of an expression of residents’ rights to their city.<sup>59</sup> Our cities’ gardens, farms, and community parks reveal the often-collective transformative efforts undertaken by residents for reasons beyond personal (or family) financial gain. The management strategies that people use within them might be common pool resource strategies<sup>60</sup> or that of a typical hierarchical non-

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54. See Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 263 (2008).

55. *Id.*

56. See e.g., Symposium, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 261 (2009); Sheila Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 94 (2011); see also Laura Lawson & Abbilyn Miller, *Community Gardens and Urban Agriculture as Antithesis to Abandonment: Exploring a Citizenship-Land Model*, in *THE CITY AFTER ABANDONMENT* 17-40 (Margaret Dewar & June Manning Thomas eds., 2013); Spirn, *supra* note 35.

57. See e.g., Lawson & Miller, *supra* note 56.

58. See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 572 (2013).

59. See e.g., Clara Irazábal & Anita Punja, *Cultivating Just Planning and Legal Institutions: A Critical Assessment of the South Central Farm Struggle in Los Angeles*, 31 J. URB. AFF. 1, 6 (2009) (citing HENRI LEFEBVRE, *LE DROIT A LA VILLE* (1968)).

60. A common pool resource is a “natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use.” Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36

profit enterprise, or they might be operated by a solitary gardener to benefit the community as a whole.<sup>61</sup> All of these spaces represent a coming together by community residents to create food, build ties, and share resources, often pulling from historic farming traditions.<sup>62</sup> Each rests on some form of mutual aid,<sup>63</sup> self-determination,<sup>64</sup> and self-government.<sup>65</sup>

As to the question of governance, Nate Ela writes that “[i]nstead of relying on local government to bring about the commons by ordinance, urban farmers and gardeners are said to be ‘self-organizing’ the rules of the urban commons.”<sup>66</sup> He suggests that garden governance structures “are not what we usually associate with the commons.”<sup>67</sup> The internal structure is not the point, nor is it even whether the gardeners have named these spaces as “commons.” As Ela notes, gardeners and “their allies in and out of city government are keen to devise ways for people to access and use land as a shared, productive resource.”<sup>68</sup>

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HARV. ENVTL. L. REV. 445, 450 (2012) (quoting ELINOR OSTROM, 30 GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990)).

61. Domenic Vitiello, *Twenty-First Century Urban Renewal in Philadelphia: The Neighborhood Transformation Initiative and Its Critics*, PLANNERS NETWORK (Jan. 22, 2007), <http://www.plannersnetwork.org/2007/01/twenty-first-century-urban-renewal-in-philadelphia-the-neighborhood-transformation-initiative-and-its-critics/> [https://perma.cc/YL5Z-E3YB] (noting that “solitary gardeners” are often growing for the benefit of a whole community).

62. See DOMENIC VITIELLO & MICHAEL NAIRN, 2008 HARVEST REPORT (Oct. 2009); Morgan Bushnell, *Ethnographic Study of Eastwick Garden* (student paper) (2012) (“One of my first questions to the gardeners was ‘Where did you learn to garden.’ And to this questions I received rolled eyes and easy answers. ‘I’m from the South. It’s in my blood.’”); Morgan Bushnell, *Oral History: Carlton C. Pounds* (2012).

63. See e.g., Naomi Tsur, *Global Round Table: The Sky Is the Limit for Urban Agriculture. Or Is It? What Can Cities Hope to Get from Community Gardens and Urban Agriculture?*, THE NATURE OF CITIES (Apr. 7, 2014), <http://www.thenatureofcities.com/2014/04/07/the-sky-is-the-limit-for-urban-agriculture-or-is-it-what-can-cities-hope-to-get-from-community-gardens-and-urban-agriculture/> (“[L]ike mothers of large families, community gardens multi-task.”).

64. See e.g., Monica M. White, *Sisters of the Soil: Urban Gardening as Resistance in Detroit*, 5 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 13, 13 (Fall 2011) (looking at black women activists, who participate in urban agriculture as a way of reassessing their cultural roots and reclaiming personal power, freed from the constraints imposed by consumerism and marketing, on the supply of food in the city of Detroit).

65. See e.g., Trevor Hancock, *People Partnerships, and Human Progress: Building Community Capital*, 16 OXFORD HEALTH PROMOTION 275 (2001), <http://heapro.oxfordjournals.org/content/16/3/275.full> [https://perma.cc/SC4P-YPP5] (“[The community gardens] are created and managed by the community itself and depend upon a cohesive social network to organize and manage the gardens.”).

66. Ela, *supra* note 16, at 249.

67. *Id.* at 250.

68. *Id.* at 258.

The point is that people who live in neighborhoods have responded to the forces pulling resources from their communities by improving the value and welfare of their communities and determining the future of their neighborhood. Using this accepted definition, the transformed parcels on Alter Street in Philadelphia have been, for several generations, manifestations of “the commons.”

### C. Visiting the Greens

#### 1. Philadelphia, 1937-2005

Philadelphia community gardening has deep roots, which begin with the Vacant Lot Cultivation Association (VLCA), founded in 1897. The VLCA assisted Philadelphia residents in accessing vacant parcels for children’s gardens and entrepreneurial market gardens.<sup>69</sup> Of Philadelphia’s current active gardens, few reach back as far as the ones started by Mrs. Mabel Wilson and the Central Club for Boys and Girls on Alter Street,<sup>70</sup> but many date back thirty years or more, as residents partnered with the Pennsylvania Horticultural Society and Penn State Extension to respond to the impacts of “[d]eindustrialization and population loss” of the 1960s, 70s, and 80s.<sup>71</sup> Gardeners reclaimed abandoned parcels citywide, as the Alter Street neighbors had done, and like Mrs. Wilson and her neighbors on Alter Street, most of Philadelphia’s gardeners were Black, Puerto Rican, and South Asian, migrating to the city with farming traditions that helped them cultivate spaces for growing culturally appropriate food and preserve culture.<sup>72</sup>

The 2500 block of Alter Street is just at the northeast edge of the Grays Ferry neighborhood, cut off from the adjacent Point Breeze neighborhood by train tracks to the east and nestled in the middle of industrial uses that have waned over time.<sup>73</sup> It is difficult, several lifetimes later, to point to why the specific owners of eighteen out of twenty-six parcels on one South Philadelphia block abandoned their properties. What is known is that, as

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69. VITIELLO & NAIRN, *supra* note 62, at 26.

70. *Id.*

71. *Id.* at 29 (“Tadpole Baldwin’s house in Belmont was practically the only one left on the block when, in the later 1970s or early 80s this man born in the South organized a large garden.”).

72. *Id.* at 27 (citing Libby J. Goldstein, *Ethnic Diversity in the Gardens of Philadelphia: Pigeon Peas and Banana Trees*, CITY FARMER (Oct. 27, 1997), <http://www.cityfarmer.org/Phillyethnic11.html#Philly%20Ethnic> [https://perma.cc/7DZT-SHXG]).

73. See generally Mike Newall, *Race, Recreation and Redemption in a Troubled South Philly Neighborhood*, PHILA. CITYPAPER (Aug. 4, 2005), <http://citypaper.net/articles/2005-08-04/cover.shtml> [https://perma.cc/98SY-KBRL].

far back as 1937 and less than a decade following Mrs. Wilson's arrival, a HOLC surveyor flagged the neighborhood as containing "detrimental influences" of "Negro encroachment" and "heavy obsolescence" and labeled it as Security Grade "D."<sup>74</sup> In other words, the neighborhood was redlined.<sup>75</sup> Unlike the majority-Black Point Breeze, Grays Ferry has long been an interracial neighborhood, but one beset by racial tensions coming out of ongoing integration of the neighborhood and exploding several times over many decades,<sup>76</sup> including a week-long race riot when a black female probation officer moved into the neighborhood in 1918.<sup>77</sup>

Mrs. Wilson may well have been taking a personal risk when she moved to Alter Street in 1928, but she immediately took leadership. By 1929, she had purchased the uninhabited building across the street from her home with the entirety of her savings – five hundred dollars – to create the Central Club for Boys and Girls.<sup>78</sup> She did not stop there. The voids left by neighbors, swept from the neighborhood by systemic conditions and life circumstances, were filled, under Mrs. Wilson's unwavering leadership, by those who stayed and created what they needed to survive and thrive.<sup>79</sup> Multiple generations of Alter Street residents cared for at least a dozen parcels on one small block.

For over seventy years, Central Club members functioned as the adoptive stewards of Alter Street's left-behind lots. The Central Club lots were home to decades of 4-H groups, Boy and Girl Scout troops, and vacation bible school,<sup>80</sup> sometimes supported with public funding.<sup>81</sup>

74. Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENVTL. L. 551, 590-92 (2010).

75. Homeowners' Loan Corporation Area Description (1937), <http://www.nis.cml.upenn.edu/redlining/PDFs/HOLC1937/libroD18.pdf> [<https://perma.cc/K7N2-EJGQ>].

76. Mark Bowden, *How a Grays Ferry Street Fight Became a Racial Crisis the Strife in the Neighborhood Had Been Brewing. Some Unlikely Alliances Had to Form to Prevent It from Boiling Over*, PHILLY.COM (Apr. 13, 1997), [http://articles.philly.com/1997-04-13/news/25531239\\_1\\_racial-attack-annette-williams-racial-crisis](http://articles.philly.com/1997-04-13/news/25531239_1_racial-attack-annette-williams-racial-crisis) [<https://perma.cc/8PDZ-JSFJ>].

77. *Grays Ferry History*, BLACKBOTTOM (Apr. 2009), <https://theblackbottom.wordpress.com/communities/grays-ferry/history/> [<https://perma.cc/73T2-2FCD>].

78. John F. Morrison, *Mabel Wilson, 96, Community Leader*, PHILLY.COM (July 20, 2010), [http://articles.philly.com/2010-07-20/news/24970685\\_1\\_bible-study-boy-scout-troop-community-house](http://articles.philly.com/2010-07-20/news/24970685_1_bible-study-boy-scout-troop-community-house) [<https://perma.cc/RA9F-5GB7>].

79. See generally Lawson & Miller, *supra* note 56.

80. See *1940s Snapshot*, CENT. CLUB FOR BOYS & GIRLS <https://centralclubforboysandgirlsphilly.wordpress.com/pic-archive-1940s/> [<https://perma.cc/EZ98-CRRJ>].

81. Nicolas Esposito, *Urban Farmers Look to Land Bank for Help Holding on to Property*, HIDDEN CITY PHILA. (Jan. 30, 2015), <http://hiddencityphila.org/2015/01/urban-farmers-look-to-land-bank-for-help-holding-on-to-property/> [<https://perma.cc/4D3B-XJE8>].

Members created garden plots, provided food baskets for area families, and hosted sixty-nine years of annual Central Club events, alumni gatherings, family reunions, and repasts.<sup>82</sup> The club itself had legal status; it had incorporated in the Commonwealth of Pennsylvania as a nonprofit corporation in 1947.<sup>83</sup> However, the corporation had no visible legal connection to the land, placing residents in constant risk of losing access to this common resource via a market-driven enclosure.

## 2. *New York, 1974-1998*

Local rumor is that United States Congresswoman Shirley Chisholm grew up in the house that used to stand at 89 Schenectady Avenue, Brooklyn.<sup>84</sup> A Weeksville historian points to the concrete steps that have since been re-purposed as a recirculating pool full of fish and says: “Those were the steps into her house.”<sup>85</sup> In 1982, the house, and the whole neighborhood, was in pretty bad shape. The city ordered the building demolished.<sup>86</sup>

Once the site of the first independent Black community in New York, Weeksville was squarely within the red lines of the HOLC maps; no access to credit meant that properties deteriorated.<sup>87</sup> While many people left, many also stayed, deepening their roots in the neighborhood.

Our Lady of Charity, a national model for Black Catholic education and community outreach,<sup>88</sup> became a rallying place and a haven in a segregated city. Delores Olff, a parishioner, told the *New York Times* in 1989 that, before joining Our Lady of Charity, she belonged to an integrated church, also in Brooklyn, that had a white priest.<sup>89</sup> Olff once said, “[y]ou know, the

82. See Myers, *supra* note 12.

83. See *id.*

84. Interviews with community leaders in Weeksville, at the Imani Garden, and in the neighborhood surrounding the site (Apr. 2015 to Mar. 2016) [hereinafter Interviews].

85. *Id.*

86. See NYC Department of Buildings, <http://a810-bisweb.nyc.gov/bisweb/ActionsByLocationServlet?requestid=1&allbin=3826328> [https://perma.cc/82GJ-Z3M7].

87. Hagstrom's Map of Brooklyn, HAGSTROM COMPANY (1938), <https://dl.dropboxusercontent.com/u/3961868/HOLC%20Maps/HOLC/BrooklynHOLC-MED.jpg> [https://perma.cc/HRQ5-ZDDV].

88. *First Black Catholic Choir to Perform Messiah at Alice Tully Hall*, CATHOLIC ONLINE (Nov. 1, 1999), <http://www.catholic.org/prwire/headline.php?ID=42> [https://perma.cc/YEE7-9LVN].

89. Ari L. Goldman, *In Brooklyn, Support for a Maverick Priest*, N.Y. TIMES (July 10, 1989), <http://www.nytimes.com/1989/07/10/nyregion/in-brooklyn-support-for-a-maverick-priest.html>.



priest refused to come to my house because he said it was in a bad neighborhood.”<sup>90</sup>

Mrs. Olff and fellow parishioners worked hard to improve the neighborhood. Without help from outside institutions, they relied on each other and their networks.<sup>91</sup> The group formed a Housing Committee, starting with the abandoned properties right around the church.<sup>92</sup> In 1981, the Committee set its sights on the neighboring dilapidated house with a yard facing the church’s sidewall and succeeded in getting two Florida residents, who shared title, to transfer the deed to a member of the committee.<sup>93</sup> That’s where the fish are now.<sup>94</sup>

The group formed an independent not-for-profit organization called Imani Community Housing and Revitalization Committee, Inc., took title to the properties, demolished the crumbling eyesores, and started their garden.<sup>95</sup> According to Jean Griffith-Sandiford,<sup>96</sup> an active gardener from 1983 to 1990, the lot was full of kale by the time she started gardening.<sup>97</sup> Gardeners from the church grew plants that reflected the traditions of their southern origins and shared the harvest.<sup>98</sup>

The not-for-profit organization relied on the Church for administration.<sup>99</sup> Although clearly using the land for a public benefit purpose that would have been sufficient to meet the standard for property tax abatement in New York City,<sup>100</sup> they never applied for it. The Church simply paid the

90. *Id.*

91. See Interviews, *supra* note 84.

92. *Id.*

93. See *Stark v. Imani*, No. 101265/2015 (Kings Co. Civ. Landlord Tenant Ct. 2015) [<https://perma.cc/ZPB5-KZV6>].

94. See Interviews, *supra* note 84.

95. NYS Department of State, Division of Corporations, Entity Information, *Imani Community and Housing Revitalization Committee, Inc.*, [https://appext20.dos.ny.gov/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?p\\_nameid=740972&p\\_corpid=657869&p\\_entity\\_name=%20Imani%20Community%20&p\\_name\\_type=%25&p\\_search\\_type=CONTAINS&p\\_srch\\_results\\_page=0](https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=740972&p_corpid=657869&p_entity_name=%20Imani%20Community%20&p_name_type=%25&p_search_type=CONTAINS&p_srch_results_page=0) [<https://perma.cc/UTT7-LGM6>].

96. Mrs. Griffith was the mother of Michael Griffith, killed at twenty-three in a racial attack in Howard Beach. See Sam Roberts, *A Racial Attack That, Years Later, Is Still Being Felt*, N.Y. TIMES: CITY ROOM (Dec. 18, 2011), <http://cityroom.blogs.nytimes.com/2011/12/18/a-racial-attack-that-years-later-is-still-being-felt/> [<https://perma.cc/Q2J9-G856>]. She led a life of activism that included founding the Griffith-Sandiford Family Assistance Fund and advocating for the creation of the Weeksville Cultural Center. *Id.*

97. See Interviews, *supra* note 84.

98. *Id.*

99. *Id.*

100. See *Not-For-Profit (NFP) Organization Property Tax Exemptions/Reductions*, N.Y.C. DEP’T OF FIN. (Mar. 26, 2016), <http://www1.nyc.gov/site/finance/benefits/benefits-not-for-profit-organizations.page> [<https://perma.cc/KYE4-NED3>].

tax bill when it arrived every year.<sup>101</sup> The garden thrived,<sup>102</sup> expanding to a third City-owned lot between the Church and the donated properties. They called it Imani.<sup>103</sup>

## II. THE INVISIBILITY OF COMMUNITY-STEWARDED SPACE

Community-managed open spaces in urban places often began with the abandonment of those same places—the complete removal of attention, resources, and responsibility over a space by the legal owner and municipal government alike that leads to “distress.” These are the conditions that engender community-led grassroots transformations. They are also the conditions that often lead to the invisibility and the vulnerability of these essential community spaces. The very bedrock institutions into which residents have poured life and from which the neighborhood draws sustenance become the most fragile. They are simply “real estate” when urban space is transformed from city-as-commons into city-as-commodity.

The forces that threaten community gardens and open spaces within the context of city-as-commodity reflect the situation of small-scale and community-based food producers worldwide.<sup>104</sup> As Smita Narula examined with respect to agricultural land rights in the global context, a market-driven approach systemically ignores the rights—and leads to the eviction of—marginalized communities with historic connections to land.<sup>105</sup> When land is seen purely as a commodity, a framework that uses the market to formalize rights provides no mechanism to account for existing scenarios reflective of “communal visions of land ownership.”<sup>106</sup> A market-driven approach attempts to maximize productivity on land viewed as “‘empty’ or ‘unoccupied’”—land which might be subject to “long-standing rights of use, access and management based on custom.”<sup>107</sup> The result, for agricultural land globally as for urban community gardens, is the transformation of “a collective interest into an individualized one”<sup>108</sup> and the displacement, appropriation, and enclosure of a community resource.

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101. See Interviews, *supra* note 84.

102. *Id.*

103. *Id.*

104. Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT'L L. 101, 109-10 (2013).

105. *Id.*

106. *Id.* at 123.

107. *Id.* at 124.

108. Blomley, *supra* note 1, at 316 (“Property is the threat, in other words, and that which is threatened.”).

That threat of enclosure persists as one of the “greatest barriers to the implementation and sustainability” of community gardens.<sup>109</sup> Gardeners have long understood “land tenure [to be] both a challenge and a vital element to the future success of the movement.”<sup>110</sup> In 2008, Domenic Vitiello and Michael Nairn identified land policy and associated lack of land security as one of the major causes of the disappearance of almost half of Philadelphia’s gardens over a twelve-year period.<sup>111</sup>

Land insecurity manifests in a host of ways, many of which are rooted in invisibility to the city-as-commodity. When gardens emerge from abandoned spaces, they are often tied up in a quagmire of privately owned tax delinquent land, but are not party to—not *seen* as part of—the transactions surrounding concerning that land, which can include property tax and mortgage foreclosure sales, tax lien securitization, speculative real estate transactions, and even title fraud. Many gardens often lack capital and thus do not always have the resources necessary to achieve preservation.

As a result of lacking financial capital, gardeners are, often viewed as lacking political capital and, thus, ignored in decision-making about one garden or in policy-making that affects the future of many gardens and open spaces. Policies regarding access to public land treat gardens as an “interim use” for a parcel that is awaiting a “higher and better” use,<sup>112</sup> while municipal government agencies often label garden parcels as “vacant” land, despite years of community activity.<sup>113</sup> When the city is commodity, vacant land as a whole is consistently perceived as a scarce resource even when cities struggle to put specific inactive spaces into productive reuse.

In this context, gardens are allowed to stay put until some other entity desires to purchase the land. Only then do community-stewarded spaces lose out in a contest against “revenue-generating” uses, without being seen as valuable to the health and sustainability of a neighborhood in a more holistic sense.

Residents who create gardens do so disproportionately in historically marginalized communities—low-income neighborhoods, neighborhoods

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109. Jessica Owley & Tonya Lewis, *From Vacant Lots to Full Pantries: Urban Agriculture Programs and the American City*, 91 U. DET. MERCY L. REV. 233, 243 (citing Jeffrey Yuen, *City Farms on CLTs: How Community Land Trusts Are Supporting Urban Agriculture*, in 26 LAND LINES 2, 3 (Maureen Clarke ed., 2014)).

110. Yuen, *supra* note 109, at 3 (citing a 1998 American Community Gardening survey of more than 6000 community sites).

111. See VITIELLO & NAIRN, *supra* note 62, at 38.

112. See WACHTER ET AL., *supra* note 50.

113. See *id.*

where Black and brown people live, and immigrant neighborhoods.<sup>114</sup> Decisions about these so-called distressed neighborhoods are likely made at a distance from and without the participation of residents, while the work of residents themselves is undervalued.

And, practically speaking, most land insecure gardens are contending with not just one, but multiple concurrent land tenure challenges, rooted in overlapping invisibilities.

### A. Tax Place: Debt Is More Valuable Than a Garden

Property tax delinquency is both a cause and effect of abandonment and disinvestment. Abandoned property can sit for generations without the party named on the deed participating in maintenance or paying real estate taxes. And in Philadelphia, it is the “landlords, speculators and investors who do not live at the delinquent properties they own” who most often fail to pay.<sup>115</sup> The mechanisms to collect property tax debt have long been broken.<sup>116</sup> Nothing might happen for years until, at some arbitrary point, some entity decides there is value to capture in the property and moves forward with collection efforts that end in foreclosure and transfer of title.

#### 1. Philadelphia, 2005-2015

Although its on-the-ground presence on Alter Street was unmistakable, Central Club could not build wealth by accruing equity in the property over time or create the stability that comes from community ownership of property;<sup>117</sup> deeds remained for decades in the names of owners who had

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114. See, e.g., Voicu & Been, *supra* note 54, at 241.

115. Patrick Kerkstra, *Part One: Lax Property Tax Enforcement and Brazen Deadbeat Investors Have Depressed Philadelphia's Property Tax Base by \$9.5 Billion*, PLANPHILLY (Mar. 9, 2013), <http://planphilly.com/articles/2013/03/09/part-one-lax-property-tax-enforcement-and-brazen-deadbeat-investors-have-depressed-philadelphia-s-property-tax-base-by-9-5-billion> [https://perma.cc/Z9XX-FVQN].

116. Philadelphia has one of the worst records of property tax collection in the country. See Patrick Kerstra & Jared Brey, *Ravaged by Neglect, Part Three: Delinquents Enabled by City's Failings*, PLANPHILLY, (Mar. 12, 2013), <http://planphilly.com/articles/2013/03/12/ravaged-by-neglect-part-three-delinquents-enabled-by-city-s-failings> [https://perma.cc/29VU-APCR] (“In April 2009, city records identified 59,600 properties with at least three years of unpaid taxes.”).

117. For example, through a community land trust. A Community Land Trust (CLT) is a concept that combines common ownership of land with individual ownership of any improvements on the land. See John Emmeus Davis, *Origins and Evolutions of the Community Land Trust and the United States*, in *THE COMMUNITY LAND TRUST READER* 3, 9 (John Emmeus Davis ed., 2010). For local, community gardens, CLTs are able to provide a locally controlled approach to land use that encourages community engagement. Yuen, *supra* note 109, at 3. Incorporating the CLT model to community gardening enables the best use of the property, allowing it to be community-defined, community controlled, and adaptable to changing conditions. *Id.*; see also BROOK. QUEENS LAND TR.,

last acquired the property in 1911 or soon after.<sup>118</sup> Tax debt bills and municipal liens addressed to absent owners mounted.<sup>119</sup>

The debt on property itself is a commodity for trade. Many municipalities, including Philadelphia and New York City, have a history of securitizing that debt such that it is sold to private entities.<sup>120</sup> Investors buy the debt assured that they will make money on interest and fees and speculating on the value of the property itself should collection fail. Community land stewards are often unaware when debt against the properties they care for is bundled and sold because they do not receive notice. Even where they do receive notice, stewards do not have access to sufficient counsel to understand that the accrued tax debt and subsequent sale can lead to the loss of the property.<sup>121</sup> Many believe that property taxes do not apply because they are incorporated as not-for-profit entities.

Invisible debt mounts and transforms into a lien against the property that can be sold.<sup>122</sup> A private purchaser of municipal debt adds interest, costs, and attorneys' fees and can pursue tax foreclosure actions.<sup>123</sup> The impact of these actions on existing users – often gardeners – is irrelevant to the buyer and seller of the debt.

On the 2500 block of Alter Street, it took the City of Philadelphia more than thirty years of recorded property tax debt before the Department of Revenue initiated foreclosure proceedings—selecting two non-adjacent properties out of the many Central Club had stewarded for years.<sup>124</sup> In 2005, foreclosure proceedings resulted in those properties being sold at auction and Central Club lacked any legal status to protect its interest in the

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<http://www.bqlt.org/> [<https://perma.cc/EBA9-SVEX>]; NEIGHBORHOOD GARDENS TR., <http://ngtrust.org/> [<https://perma.cc/4BVF-APFY>].

118. See, e.g., Myers, *supra* note 12; Defendant's Petition to Stay Execution, *supra* note 13.

119. Defendant's Petition to Stay Execution, *supra* note 13.

120. See, e.g., Ben Hayllar, *Philadelphia's Tax Lien Sale and Securitization*, THE FREE LIBRARY (Aug. 2013), [http://www.thefreelibrary.com/Philadelphia's tax lien sale and securitization.-a020219252](http://www.thefreelibrary.com/Philadelphia's+tax+lien+sale+and+securitization.-a020219252) [<https://perma.cc/HU2X-BH59>]; John Krinsky, *Managing New York City's Rental Housing Catastrophe: The Once and Future Potential of Tax-Foreclosed Properties*, METROPOLITICS (Oct. 20, 2015), <http://www.metropolitiques.eu/Managing-New-York-City-s-Rental.html> [<https://perma.cc/CVC6-ZQN2>].

121. See, e.g., Defendant's Petition to Stay Execution, *supra* note 13.

122. See, e.g., Alan S. Osher, *Perspectives; New York City Shifts Tactics on Troubled Housing* N.Y. TIMES (June 16, 1996), <http://www.nytimes.com/1996/06/16/realestate/perspectives-new-york-city-shifts-tactics-on-troubled-housing.html>.

123. *Id.*

124. Philadelphia Office of Property Assessment Search Engine, <https://alpha.phila.gov/property/?bn=2500&bs=Alter%20Street/> [<https://perma.cc/A4VS-QLSG>] (showing "valuation, tax, and physical details of properties within the City of Philadelphia"). Philadelphia property tax records only go back to 1978.

gardens<sup>125</sup> Despite years of stewardship, Central Club lost the properties to speculative real estate interests that, to this day, have done nothing with the land.<sup>126</sup>

With Central Club's legacy at risk, its board filed a series of quiet title actions asserting ownership of the remaining "vacant" parcels based on adverse possession or squatters' rights.<sup>127</sup> Central Club prevailed in 2010, establishing equitable title to eight parcels, relying on the court's authority to declare Central Club's equitable ownership under the doctrine of adverse possession.<sup>128</sup> However, without the resources to pay the transfer taxes to put the deeds in its name and immediately burdened by the tax debt of long absent owners, Central Club was still legally invisible. The risk of being displaced from the land Mrs. Wilson and her successors nurtured continued.<sup>129</sup>

Central Club was legally invisible to the formal property registration system; at the same time, Central Club could not see debt owed on the properties prior to 1996. That debt had been sold to a private bank as securitized tax liens; even a search of the City of Philadelphia's online tax records would not have reflected pre-1997 debt.<sup>130</sup> With Central Club

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125. See Myers, *supra* note 12; see also Defendant's Petition to Stay Execution, *supra* note 13, at 68.

126. Defendant's Petition to Stay Execution, *supra* note 13, at 68.

127. Myers, *supra* note 12; see also Defendant's Petition to Stay Execution, *supra* note 13, at 44.

128. See Ashley Hahn, *Community Farm in South Kensington Claiming Its Ground in Court*, PLANPHILLY (Mar. 23, 2016), <http://planphilly.com/articles/2016/03/23/community-farm-in-south-kensington-claiming-its-ground-in-court> [<https://perma.cc/W5MG-7Q42>]. Under Pennsylvania law, adverse possession permits acquiring formal ownership of property through showing the current occupant had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for 21 years. *Baylor v. Soska*, 540 Pa. 435, 438 (1995) (citing *Conneaut Lake Park, Inc. v. Klingensmith*, 362 Pa. 592 (1949)).

129. See Myers, *supra* note 12.

130. Ben Hayllar, *Philadelphia's Tax Lien Sale and Securitization*, THE FREE LIBRARY (Dec. 1, 1997), [http://www.thefreelibrary.com/Philadelphia's tax lien sale and securitization.-a020219252](http://www.thefreelibrary.com/Philadelphia's+tax+lien+sale+and+securitization.-a020219252) [<https://perma.cc/B4LS-6XX3>]. In 1997, Philadelphia Mayor Ed Rendell "bundled 33,000 tax liens and, through a bond issued by the Philadelphia Industrial Development Corporation, collected \$106 million" to fund the underfinanced school district and encourage economic developments. Holly Otterbein, *3 Arguments for, and 3 Against, Darrell Clarke's Alternate School Funding Plan*, PHILA. MAG. (Jan. 15, 2016), <http://www.phillymag.com/news/2015/04/14/darrell-clarke-school-funding-tax-deadbeats> [<https://perma.cc/8QQY-FXSD>]. But years later, the city was forced to default on \$46 million in bonds when investors had trouble collecting the overdue taxes and finding the lots' owners. Overall, the sale was regarded as a disaster for the city as it both failed to provide the touted economic benefits and exacerbated abandonment. The properties selected for the lien sale were those with the most uncollectable debt. These properties "remained in limbo for years and unavailable for redevelopment. Public agencies could not acquire the property without first paying the lien holder the value of the lien, plus their fees, which stymied efforts to get vacant, tax delinquent properties back into productive use." Letter from Rose Gray, Asociación Puertorriqueños en Marcha et al. to Mayor Michael

acknowledging its title and seeking legal control of the land, the pre-1996 tax debt unknowingly became ripe for collection. In 2011, a private bank, filed foreclosure actions against the deceased recorded owners of three of the eight Central Club parcels.<sup>131</sup> Because Central Club had not, yet, paid the tax to transferred title into its name, the tax collector itself did not see Central Club as the owner and did not provide notice of the sale to the Club. They didn't even bother to put up a sign. The Club scrambled to have a voice in the proceedings.<sup>132</sup>

Central Club found the negative effects of abandonment compounded by policies used to “solve” such problems—property tax foreclosure and privatization of tax debt.<sup>133</sup> External solutions to the problem of disinvestment failed to account for the existence of the land's stewards, ultimately penalizing the very community members that invested when no one else would.

## 2. “Interim Use” Never “Highest and Best”

Gardens on publicly owned property might be more visible when a municipality is the legal owner of record, as opposed to private entities like in the case of Central Club. Cities often rely on gardens for vacant land management. Gardens might be tacitly accepted, despite a lack of formal legal permission, or might be granted temporary permission via a “garden license.” Unlike a lease, which provides a property right, a standard license is revocable at any time without cause.<sup>134</sup> Thus, a license offers no land security, only temporary permission that comes with the assurance that one is no longer trespassing. These agreements reflect the perception within many city governments, in Philadelphia, New York, and elsewhere, that urban agriculture is an “interim use.”<sup>135</sup>

Community-stewarded spaces can exist as licensed or ignored places until another entity expresses interest in purchasing the land from the municipality. The garden's value absorbs into the market value of the

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Nutter, City of Phila. (June 11, 2015) [<https://perma.cc/8E8V-GE9E>]. Overall, “[t]he bulk sale of tax liens creates a category of properties (“Limbo Properties”) which remain tax delinquent, increase destabilization, and are beyond control of the City.” *Id.* at 3.

131. Defendant's Petition to Stay Execution, *supra* note 13, at 5.

132. Myers, *supra* note 12. Central Club worked with newly-formed Garden Justice Legal Initiative (GJLI) at the Public Interest Law Center, which had launched one month before.

133. See Defendant's Petition to Stay Execution, *supra* note 13 at 53-54.

134. Witt, *supra* note 7, at 227; see, e.g., Office of the State Comptroller, State of New York, (Dec. 22, 1988) (distinguishing between the temporary privilege of a “revocable license” and the greater rights associated with a lease).

135. WACHTER ET AL., *supra* note 50, at 34.

property, but the garden stewards are not a party to the transaction. Their labor disappears under the cover of the City's formal deed ownership.

Even when seen, community-stewarded spaces—and their creators—are often perceived as merely steppingstones to a “higher and better” use,<sup>136</sup> i.e. a use that results in the highest value for transactions that involve the market transfer of the land.<sup>137</sup> A 2010 study created for the Philadelphia Redevelopment Authority (PRA) makes this clear. It advised, “[i]t is appropriate for the [PRA] to pursue temporary urban agriculture arrangements on its low-value parcels, regardless of whether it represents the final highest and best use of those parcels, when agricultural uses increase the value of those parcels and of neighboring parcels.”<sup>138</sup>

In short, the PRA was advised to view gardening as “a means to other ends”<sup>139</sup>—using community power to both manage publicly owned resources and increase their marketability until that “higher and better” buyer emerged.<sup>140</sup>

At the time, access to public land in Philadelphia was managed through license agreements from the city's Redevelopment Authority.<sup>141</sup> By 2010, Philadelphia gardeners and farmers had seen several decades of garden losses when licenses were revoked. A 2008 “Harvest Report” found that the number of gardens declined by half from 1996 to 2008.<sup>142</sup> In collecting garden histories citywide, authors Nairn and Vitiello heard the same story from at least a dozen gardeners: “[A] man came from the city one day, told me we couldn't garden here anymore; and in a week or two a bulldozer came and cleared the garden.”<sup>143</sup>

Some spaces, like the “decades-old Garden of Eatin’,” were sold to developers.<sup>144</sup> Other gardeners lost spaces to a twenty-first century

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136. Peleg Kremer & Zoé Hamstead, *Transformation of Urban Vacant Lots for the Common Good: An Introduction to the Special Issue*, 8 CITIES & ENVIRONMENT 1, 2 (2015).

137. See, e.g., Stephen Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 URB. LAW. 113, 113 (1989) (“Highest and best use can be defined as a use that has the following characteristics: (1) it is legally and physically possible; (2) it is appropriately supported; (3) it is financially feasible; and (4) it results in the highest land value.”).

138. *Id.*

139. See WACHTER ET AL., *supra* note 50, at 34.

140. *Id.*

141. Vitiello, *supra* note 61; see also Michael Nairn, *Keeping the Community in Community Gardening: Aquí Estamos y no nos Vamos*, PROGRESSIVE PLAN. MAG. (Jan. 22, 2007), [http://www.plannersnetwork.org/wp-content/uploads/2012/07/2007\\_170\\_winter\\_p.pdf](http://www.plannersnetwork.org/wp-content/uploads/2012/07/2007_170_winter_p.pdf) [https://perma.cc/PQ6M-5TAD].

142. VITIELLO & NAIRN, *supra* note 62, at 44.

143. *Id.* at 36.

144. *Id.* at 35.



incarnation of urban renewal “blight” clearance programs.<sup>145</sup> Through the Neighborhood Transformation Initiative (NTI), a project of former Philadelphia Mayor John Street, the PRA scaled up vacant land management and used eminent domain, in combination with demolition, to create assemblages created to attract developers—a goal with limited success.<sup>146</sup>

Gardens became collateral damage in this process, as the city displaced gardeners and absorbed land into larger parcels to induce market interest and encourage the enclosure of community property. And yet, many of these and other NTI spaces remained vacant and undeveloped for a decade, replicating the failures of decades of top down and shortsighted urban renewal initiatives.<sup>147</sup>

Throughout changes in policy and political administrations, gardeners and other community land stewards have struggled to understand even basic facts about who owns land and how to get legal access. By 2010, multiple city agencies held title to and bore responsibility for one quarter of the city’s 40,000 so-called vacant lots.<sup>148</sup> Each agency had, and still has, a different process and priorities for making land available for sale or lease, and each process can be lengthy and full of pitfalls.<sup>149</sup> Even a successful acquisition of a city-owned parcel could take up to three and a half years.<sup>150</sup> For the remaining 30,000 privately owned and mostly tax delinquent parcels,<sup>151</sup> the path to legal access was even more fraught as the owners of

145. *See supra* note 29.

146. *Id.*

147. *Id.* at 35-36.

148. Prior to 2015, these agencies were Redevelopment Authority of the City of Philadelphia (RDA), the City of Philadelphia Department of Public Property, Philadelphia Housing Development Corporation, and Philadelphia Housing Authority. Black, *supra* note 17; *see also* ECONSULT CORP. ET AL., VACANT LAND MANAGEMENT IN PHILADELPHIA, at i, 9-10 (2010) (outlining the many and various agencies tasked with maintaining vacant land as of 2010). As of December 9, 2015, the City of Philadelphia began transferring properties into a fifth city-controlled entity, the Philadelphia Land Bank, tasked with streamlining access to land. Claudia Vargas, *Phila. Land Bank Now Open for Business*, PHILLY.COM (Dec. 11, 2015), [http://articles.philly.com/2015-12-11/news/68934205\\_1\\_vacant-properties-city-council-philadelphia-land-bank](http://articles.philly.com/2015-12-11/news/68934205_1_vacant-properties-city-council-philadelphia-land-bank) [<https://perma.cc/EZ5A-887A>].

149. *See, e.g.,* Ryan Briggs, *How to Fix Philly’s Massive Vacant Land Problem*, PHILLY.COM (June 8, 2015), [http://www.philly.com/philly/news/politics/mayor/How\\_to\\_fix\\_Phillys\\_massive\\_vacant\\_land\\_problem.html](http://www.philly.com/philly/news/politics/mayor/How_to_fix_Phillys_massive_vacant_land_problem.html) [<https://perma.cc/YP9V-68B9>]; *see also* Amy Laura Cahn, *Supporting Our Land Stewards: Building a Constituency to Change Policy and Preserve Philadelphia’s Gardens*, 8 CITIES & ENVIRONMENT 1,3 (2015).

150. Black, *supra* note 17; *see also* PHILLY LAND BANK, VACANT PROPERTY DISPOSITION PROCESS, [http://may8consulting.com/publications/Landbank\\_Chart.pdf](http://may8consulting.com/publications/Landbank_Chart.pdf) (comparing the steps involved in property acquisition prior to the passage of the Philadelphia Land Bank Law with the process that creation of the land bank would initiate).

151. *See* Kerkstra, *supra* note 17.

record were often deceased or long-disappeared, with a process of bringing properties to tax foreclosure sale that has long been “both highly politicized and inefficient.”<sup>152</sup> Thus, while gardeners had the tacit support of the City to function as a *de facto* land management team, the lack of access to the process dictated that gardeners largely operated under the radar, particularly in Philadelphia’s most disenfranchised neighborhoods.<sup>153</sup>

Gardeners, farmers, and other land stewards would soon be reminded that they did not fully exist to city officials as stakeholders, even as decisions were being made to fundamentally change their landscape *in* the city. In 2010, Philadelphia’s land holding agencies also zeroed in on the task of addressing the city’s “vacant land problem.”<sup>154</sup> This multi-pronged effort included advocating for a state law to enable the creation of local “land banks,” improving vacant land management systems, developing common land acquisition and disposition policies across city agencies, and inventorying all of the city’s land holdings and developing a web-based tool to map and more efficiently make City-owned vacant lots available as commodities for sale to private actors.<sup>155</sup> By December 2011, new vacant land disposition policies began to circulate for informal comment. The city’s view of stakeholders did not include its existing land stewards: policies for community gardens recycled the existing, insecure mechanism for land access, the revocable license. The draft policies even proposed to raise barriers to obtaining this tenuous version of land tenure: they proposed that an applicant for a license had to be sponsored by a registered nonprofit organization and show proof of liability insurance,<sup>156</sup> which can be both expensive and difficult to acquire.<sup>157</sup> In a city where community

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152. Briggs, *supra* note 149.

153. See e.g., VITIELLO & NAIRN, *supra* note 62, at 35-36; Mahbubur R. Meenar et al., *Urban Agriculture in Post-Industrial Landscape: A Case for Community-Generated Urban Design*, ISOCARP CONGRESS 8 (2012), [http://www.isocarp.net/Data/case\\_studies/2071.pdf](http://www.isocarp.net/Data/case_studies/2071.pdf) [<https://perma.cc/66ZK-ULQJ>].

154. Terry Gillen, *The Reform of Vacant Land Policies in Philadelphia*, FED. RES. BANK OF PHILA. (2010), [https://www.philadelphiafed.org/community-development/publications/cascade/75/03\\_reform-of-vacant-land-policies-in-philadelphia](https://www.philadelphiafed.org/community-development/publications/cascade/75/03_reform-of-vacant-land-policies-in-philadelphia) [<https://perma.cc/ZF3Y-YGDQ>].

155. VACANT PROP. RESEARCH NETWORK, VA. TECH UNIV., PHILADELPHIA’S VACANT PROPERTY JOURNEY: FOSTERING COLLABORATIVE ALLIANCES WITH CONVERGING POLICY REFORMS (Lisa Schamess et al. eds., 2013), [http://vacantpropertyresearch.com/wp-content/uploads/2013/09/Philly-Layout\\_V5.pdf](http://vacantpropertyresearch.com/wp-content/uploads/2013/09/Philly-Layout_V5.pdf) [<https://perma.cc/85RH-KPGU>].

156. CITY OF PHILADELPHIA, POLICIES FOR THE SALE AND REUSE OF CITY OWNED PROPERTY, Draft (Dec. 6, 2011), [http://planphilly.com/uploads/media\\_items/http-planphilly-com-sites-planphilly-com-files-saleandreuseofcityproperty-pdf.original.pdf](http://planphilly.com/uploads/media_items/http-planphilly-com-sites-planphilly-com-files-saleandreuseofcityproperty-pdf.original.pdf) [<https://perma.cc/C2WG-MSN8>].

157. “Maryland urban gardeners have found it impossible to purchase liability insurance to cover activities on land to which they have minimal property rights.” Witt, *supra* note 7, at 225.

stewards had operated on—and been displaced from—land formally owned by public entities for decades, no gardener was consulted and no option for long-term land tenure was proposed.

When asked why gardeners had not been consulted during a full year of meetings, a PRA staffer told members of the Mayor's Food Policy Advisory Council (FPAC) Vacant Land Subcommittee: "Urban agriculture is not a constituency."<sup>158</sup>

In response, FPAC and the now disbanded grassroots Food Organizing Collaborative (FOrC) convened over 100 gardeners and farmers over a two-week period to gather feedback about how land policy could better reflect their needs.<sup>159</sup> They highlighted the place-based nature of garden and open space stewardship, the significant and wide-ranging benefits garden and farm projects bring to communities, and the intense investment of time, money, engagement, and trust-building required to start and maintain a garden. They asked the City to make commitments towards continuity and permanence.<sup>160</sup>

As a result of this swift advocacy, revised policies were circulated within six months. These policies allowed for up to five-year leases<sup>161</sup> for community gardens and the promise of leases of variable terms for market farms, with signals that there would be a pathway to longer-term preservation for more established gardens.<sup>162</sup>

However, when the web-tool, called Philly Landworks,<sup>163</sup> launched in June 2012, the website reflected gardens' continued lack of visibility to the city and its view that these active spaces were functionally vacant.<sup>164</sup> Active garden parcels were offered for sale online, with no notice to their

158. At the time, Amy Laura Cahn was a member of the FPAC Vacant Land Subcommittee. She served as the chair of the subcommittee for two years, until becoming elected co-chair of the council in October 2015.

159. See generally JOHANNA ROSEN & AMY LAURA CAHN, COMMENTS TO DRAFT CITY DISPOSITION POLICY (Dec. 22, 2011), [http://www.pilcop.org/wp-content/uploads/2012/04/PUFN\\_FORC.pdf](http://www.pilcop.org/wp-content/uploads/2012/04/PUFN_FORC.pdf) [<https://perma.cc/3G4R-64G6>]; FEEDBACK FROM FOOD GROWERS TO PROPOSE CITY OF PHILADELPHIA LAND DISPOSITION POLICIES [hereinafter FEEDBACK FROM FOOD GROWERS], <http://www.pilcop.org/wp-content/uploads/2012/04/FPAC.pdf> [<https://perma.cc/D5TM-ZYDV>].

160. FEEDBACK FROM FOOD GROWERS, *supra* note 159.

161. Unlike a license, which is revocable at any time without cause, a lease provides a property right. See Witt, *supra* note 7, at 225-26.

162. See Cahn, *supra* note 149, at 4. Acquisition is dependent on both the capacities to negotiate complicated bureaucracy and gain political backing from the appropriate district councilperson. Even temporary legal permission has required jumping through similar political and bureaucratic hoops. See VACANT PROP. RESEARCH NETWORK, *supra* note 155; see also CITY OF PHILADELPHIA, *supra* note 156.

163. PHILLY LANDWORKS, <https://secure.phila.gov/paplpublicweb/>; VACANT PROP. RESEARCH NETWORK, *supra* note 155.

164. Cahn, *supra* note 149, at 3.

existing stewards. The city's attempt at making land visible to potential consumers ignored the broad scope of vibrant, verdant work on and *in* the ground.<sup>165</sup> Opportunity was being made visible by government actors, but was only actionable by those aiming to participate in the privatization of public assets as opposed to their protection and continued development as commons.

### 3. "Vacancy"

This notion of treating gardens as "vacant" land is perhaps the biggest culprit in rendering gardens invisible. An "interim use" policy and an associated license agreement have severe limitations and devalue gardens, but they at least acknowledge that there is something happening in the spaces that residents have transformed and care for.<sup>166</sup>

Municipal planning departments in Philadelphia and New York City refer to gardens as "vacant" spaces for planning purposes.<sup>167</sup> Thus, decisions about those spaces are made without acknowledgment of the value of these community-stewarded spaces, unless the gardeners intervene. Treating land as vacant until it is "developed" treats the gardens as if they are nothing at all; it perpetuates the myth that these active spaces are unchanged from the abandoned state that residents found them in before bringing them to life as gardens and community-managed parks.

New York City's data shows that there are over 500 "vacant" lots in the City —almost 9000 acres, about one fourth of them owned by public entities.<sup>168</sup> While all of these lots are void of buildings, a visitor or neighbor would never call many "vacant." Truly vacant lots and thriving community gardens, parks, and farms all get this same label from the NYC Department of City Planning.<sup>169</sup> Most also have development rights under the NYC Zoning Resolution—meaning the airspace above them is a place buildings are permitted to appear within prescribed height limits, perpetuating the view that these are simply future construction sites.<sup>170</sup>

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165. *Id.*

166. *See supra* Section II.A.1.

167. Other cities have Planning Departments that do this as well, but in this article we focus on our intimate knowledge of Philadelphia and New York.

168. *See* 596 ACRES, 2015 ANNUAL REPORT, [http://596acres.org/media/filer\\_public/2015/12/04/596\\_annualreport\\_online.pdf](http://596acres.org/media/filer_public/2015/12/04/596_annualreport_online.pdf) [https://perma.cc/DAY9-4ZE5].

169. *See* Foster, *supra* note 58. Gardens appear in New York Planning databases as "vacant" lots, as they do in Philadelphia, as evidenced by the inclusion of garden parcels as properties available for sale on the Philly Land Works website. PHILLY LANDWORKS, *supra* note 163.

170. El Jardin de Paraiso on the Lower East Side in Manhattan: a community-managed park that was acquired by the New York City Department of Parks and Recreation via an

The New York City Law Department relies on the garden use code of “vacant” to argue that garden lots are “general land available for a variety of municipal purposes, including [private] development.”<sup>171</sup>

While City Planning has a use code for “Open Space & Outdoor Recreation,” it is not applied to gardens and other community-managed spaces; only formal parks where all development rights have been extinguished and the areas have been zoned “Parkland” receive this code.<sup>172</sup> The over 500 “permanently preserved” community gardens in the inventory of the New York City Parks Department and under the jurisdiction of the Department of Parks and Recreation are nonetheless use-coded as ‘VACANT.’

#### 4. *New York, 1999-2015: Deciding at a Distance*

In 1999, Imani’s local efforts were interrupted by a new interest in land for construction.<sup>173</sup> New York City Hall began courting private developers to entice them to build in neighborhoods like Weeksville,<sup>174</sup> by offering free and cheap land. The garden lots were declared “surplus” and placed on a list for auction. The city prioritized developers’ interests over those of the residents. The efforts of residents to develop their own communities were anathema to the administration. When confronted by protectors of the

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eminent domain condemnation is nonetheless zoned R8B. *See id.* This means it has un-built development rights equivalent to four times its surface area. *See generally El Jardin del Paraíso*, 596 ACRES, <http://livinglotsnyc.org/lot/58428/> [<https://perma.cc/DR93-HTHL>]. *See also East 4 Street, OASIS NYC*, <http://www.oasisnyc.net/map.aspx?etabs=1&zoomto=lot:1003740062> [<https://perma.cc/X6GW-9P3T>].

171. City Respondents Memo of Law, *Coney Island Boardwalk Cmty. Garden v. City Of New York*, No. 6033 (Kings Co. Sup. Ct. 2014) [<https://perma.cc/S9JY-N9X7>].

172. These formal parks are also zoned as “Park.” *See, e.g., Central Park*, <http://maps.nyc.gov/doitt/nycitymap/template?applicationName=ZOLA>.

173. *See Foster, supra* note 58, at 535-36.

174. “One program involved in the development of these sites is the New Homes Program, which since 1982 has used various forms of governmental aid, including financing from the State of New York through the Affordable Housing Corporation (AHC), to assist privately financed construction on City-owned property of owner-occupied homes, condominiums and cooperatives. . . . Another source for the creation of affordable housing is the Nehemiah Program . . . . The City provides land, subsidies, and tax exemption for the homes. . . . A third source of affordable housing is the Low Income Housing Trust Fund Program, which is administered by the New York State Division of Housing and Community Renewal. It provides funding to non-profit corporations, municipalities, counties, housing authorities, private developers and partnerships, to build or rehabilitate housing or convert nonresidential properties to house low-income homesteaders, tenants, tenant cooperators or condominium owners. . . . HPD participates in this program by providing City-owned sites to non-profit corporations who obtain Low Income Housing Trust funding.” Appellant’s Brief, Att. Gen. of the State of N.Y. v. City of New York, 2000 WL 34551035 (N.Y.A.D. 2d Dept. 2000).

thriving gardens, former New York City Mayor Rudolph Giuliani famously quipped in a radio interview: “This is a free market economy. Welcome to the era after communism.”<sup>175</sup>

Foster and Iaione situate the proposed sale of the gardens as “surplus” thus,

City officials persistently characterized the land as “vacant,” stripping the land of its social (and economic) value to its users, and argued that in the long run the communities where the gardens sit would benefit from the new development and the affordable housing that the city planned to build on some of the lots. This characterization stripped the resource of any functional value to the community, or to the city for that matter. Yet, by auctioning off the gardens the city was able to capture the “unearned increment” from the resource—the increase in surrounding property values resulting from the improved neighborhoods—without accounting for the inevitable dispossession and displacement that ultimately resulted from gentrification of these neighborhoods.<sup>176</sup>

The two City-owned lots being used by the Imani gardeners were identified as “surplus” real estate and put on a list to be auctioned, along with hundreds of other active garden sites.<sup>177</sup> There is no indication that the gardeners or the Church administration ever knew about the auction or the list.

A white-led preservationist group, the newly formed New York Restoration Project (NYRP), leveraged private funds to save these spaces.<sup>178</sup> Whether it was the giant maple tree that Shirley Chisholm supposedly played under or the thriving rows of kale, Imani caught the organization’s eye. They added the City-owned parcels to the list of gardens they would rescue by buying them off the list.<sup>179</sup> The middle property, the one for which the Housing Committee had formed a not-for-profit to hold title, was overlooked by New York Restoration Project’s attorneys and staff.<sup>180</sup>

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175. RALPH NADER, *IN PURSUIT OF JUSTICE: COLLECTED WRITINGS 2000-2003*, at 439 (Seven Stories Press 1st ed. 2004).

176. See *Id.* at 24.

177. David Lefer, *Gardens Flap Growing Giuliani to Auction 126 Plots*, N.Y. DAILY NEWS (Feb. 21, 1999), <http://www.nydailynews.com/archives/news/gardens-flap-growing-giuliani-auction-126-plots-article-1.835298>.

178. Guy Trebay, *Bette Midler’s Park Restoration Project*, TRAVEL & LEISURE (Aug. 12, 2010), <http://www.travelandleisure.com/articles/bette-midlers-park-restoration-project>.

179. N.Y.C. DEP’T OF FIN., CITY REGISTER RECORDING AND ENDORSEMENT PAGE, [http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc\\_id=FT\\_3040007761904](http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=FT_3040007761904).

180. Memorandum from NYRP on Imani Garden (July 25, 2015) [<https://perma.cc/8H6W-DKX6>].

Citywide, gardeners argued that the spaces were valuable, as residents actively collaborated “toward common neighborhood goals and a sense of control over their space.”<sup>181</sup> The City of New York, like most municipalities, preferred to view these places as “vacant” land and disregarded the value that had accumulated through use.

Individuals and community groups endeavored to stop the auction by appealing to procedural requirements.<sup>182</sup> Attorney General Elliot Spitzer brought a claim on the basis of public trust doctrine<sup>183</sup> that led to an injunction stopping the auction and a settlement that resulted in hundreds of gardens being transferred to the New York City Parks Department for permanent preservation as gardens,<sup>184</sup> some others being offered to the Trust for Public Land (which purchased them) for preservation, and the bulldozing of dozens of others to ready sites for private housing development.<sup>185</sup>

But Imani remained in its own inscrutable context, with title held now by a patchwork of private actors. NYRP took over management of the three-lot garden and, as part of its beautification efforts, removed the rabbits and peacocks kept by the parishioners.<sup>186</sup> The Church’s relationship to the property was eroded, and, by 2003, no one was paying the property taxes on the middle lot.<sup>187</sup> The gardeners scattered. The land was left beautiful but un-used.<sup>188</sup>

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181. Foster, *supra* note 58, at 531 n. 18.

182. See Lefer, *supra* note 177.

183. On February 15, 2000, Attorney General Elliot Spitzer submitted papers opposing the City’s appeal of the decision to stop the auctioning of gardens, alleging that some of the garden lots may be land held in the public trust: “Plaintiff asserts in its Complaint that ‘[a]s a result of the long-term, consistent use of these gardens for open space, such use having been encouraged and sanctioned by the City of New York,’ the garden lots should be considered dedicated parkland.” Appellant’s Brief at 26, Att. Gen. of the State of N.Y. v. City of New York, 2000 WL 34551035 (N.Y.A.D. 2d Dept. 2000).

184. Although the settlement agreement is careful to note that this transfer is not an express dedication of the parcels as parkland, it is very likely that the standard for implied dedication, recently reiterated by the New York Court of Appeals in *Matter of Glick v. Harvey*, No. 05593, slip op. 05593 (June 30, 2015), is met: the acts and declarations by the City as the landowner indicating the intent to dedicate his land to the public use unmistakable in their purpose and decisive in their character. Note that even this standard for when protections from alienation applies is based on visibility: the clarity of the City’s acts and declarations is what is to be examined to determine whether land is protected by the public trust doctrine.

185. Jennifer Steinhauer, *Ending a Long Battle, New York Lets Housing and Gardens Grow*, N.Y. TIMES (Sept. 19, 2002), <http://www.nytimes.com/2002/09/19/nyregion/ending-a-long-battle-new-york-lets-housing-and-gardens-grow.html>.

186. See Interviews, *supra* note 84.

187. See Tr. & Bank of N.Y. v. Imani Cmty. Hous. & Revitalization Comm., Inc., No. 20423/2004 (Kings Co. Sup. Ct. 2004).

188. See Interviews, *supra* note 84.

New gardeners joined Imani between 2004 and 2011.<sup>189</sup> Seeking to expand food production, which was difficult in the shade of the willow tree, they got an “interim use” license<sup>190</sup> for a fourth lot from New York City’s Housing Preservation and Development (HPD).<sup>191</sup> That property had also once been privately owned and had come to the City inventory via tax lien foreclosure in 1979.<sup>192</sup>

Imani was again thriving, with a different set of stewards. Our Lady of Charity kept its distance from the garden. Church administrators were told NYRP was the new “owner.”<sup>193</sup>

The un-quiet statuses of the four properties making up the Imani Garden in Weeksville were in the spotlight again in 2015. In January of that year, in an effort to transform Mayor Bill de Blasio’s new housing plan into housing reality, HPD published a list of 181 “hard to develop” properties they would be willing to sell for \$1 to housing developers willing to build

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189. *Id.*

190. *See, e.g.*, License Agreement (Jan. 25, 2011), [<https://perma.cc/T8CD-GNF2>] (“Both the City and Licensee may terminate this Agreement at any time, with or without cause, upon prior written notice to the other party, except that the City agrees to use reasonable efforts to avoid terminating this Agreement between April 1 and November 1.”). *See generally* CITY OF PHILADELPHIA, *supra* note 156.

191. Michael Tortorello, *In Community Gardens, A New Weed?*, N.Y. TIMES (Feb. 11, 2015), [<http://nyccgc.org/2015/02/new-york-times-hpdcommunity-garden-article/>] [<https://perma.cc/WPP5-ZF7P>]. A unique condition to New York City is the tight political hold that the administration has on public land, particularly land that is in the inventory of New York City Housing Preservation and Development. Cole Rosengren, *Brooklyn Community Gardeners React to De Blasio Admin. Deal*, CITY LIMITS (Jan. 4, 2016), [<http://citylimits.org/2016/01/04/brooklyn-community-gardeners-react-to-de-blasio-admin-deal/>] [<https://perma.cc/GC6F-7JVK>]. This inventory is controlled, warehoused, and distributed to meet political goals and agendas. Marc Bussanich & Jarrett Murphy, *Protests as City Auctions Land Despite Housing Need*, CITY LIMITS (Oct. 30, 2015), [<http://citylimits.org/2015/10/30/protest-as-city-auctions-land-despite-housing-need/>] [<https://perma.cc/D3CT-PM2S>]. It is not land that is available for purchase without restriction on the private market. *Id.* City agencies and politicians use the incentive of free government land to create conditions under which private developers—non-profit and for-profit—agree to build housing and sometimes other neighborhood amenities. Tortorello, *supra* note 191. Public land in New York is insulated from the market; but its disposition is also usually done through a process insulated from New Yorkers outside of the politics and development communities.

192. *See generally* Deed of Sale from Harry S. Tishelman to the City of New York, 18 April 1979, New York, N.Y., *In re Tax Foreclosure Action No. 32*, Brooklyn, N.Y., [[http://a836-](http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=BK_7930106700274)

[acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc\\_id=BK\\_7930106700274](http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=BK_7930106700274) [<https://perma.cc/EC6M-GATC?type=image>]. Prior to the adaptation of the tax lien sale policy, the City used to collect its own tax debt and foreclose on properties where tax was not paid, returning them to the pool of public assets.

193. *See* Interviews, *supra* note 84.



housing that would be made available by lottery to income-tested residents.<sup>194</sup>

The list itself was buried in an Addendum to a “Request for Qualifications” (RFQ) addressed to the development community.<sup>195</sup> It referred to sites being made available through the program by their borough, block and lot numbers—a string of numbers very familiar to planners and people who work in the real estate industry, and gibberish to everyone else. The City did not distinguish between those that were truly empty of any permitted use and those that were actively being used as community gardens, pocket parks, and urban farms when the list was created.

In order to understand the City portfolio of land, in 2011, 596 Acres, Inc. had created a tool that translated data about the municipal land inventory, organized by borough, block, and lot numbers, into a public accessible online tool that showed each City-owned parcel in context: LivingLotsNYC.org.<sup>196</sup>

Mapping unused public land in 2011 revealed nearly 600 acres of common land that were simply being warehoused—land that served no neighborhood purpose and presented an opportunity to organize. This discovery interrupted the narrative of land scarcity that permeated all talk of real estate in New York City under Mayor Michael Bloomberg.<sup>197</sup> It also put information in the hands of those best positioned to use it to create regenerative new community spaces in left-behind neighborhoods: the people who lived and worked near the vacant spaces corresponding to the numbers in the City’s database.<sup>198</sup> For each parcel, the tool shows the

194. 12 C.F.R. § 1291.1(1) (defining “affordable”) (this definition creates an opportunity to build market-rate housing while calling it “affordable”); Paula Z. Segal, *From Open Data to Open Space: Translating Public Information into Collective Action*, 8 URB. VACANT LAND & COMMUNITY ACCESS, Oct. 8 2015, at 7; Joe Anuta, 2 *Affordable-Housing Programs to Launch in 2015*, CRAIN’S N.Y. BUS. (May 21, 2014), [http://www.craigslist.com/article/20140521/REAL\\_ESTATE/140529971/2-affordable-housing-programs-to-launch-in-2015](http://www.craigslist.com/article/20140521/REAL_ESTATE/140529971/2-affordable-housing-programs-to-launch-in-2015) [https://perma.cc/LDU7-AUE9]..

195. See generally N.Y.C. HOUS. PRES. & DEV., *New Infill Homeownership Opportunities Program (NIHOP) and Neighborhood Construction Program (NCP) Request for Qualifications (RFQ) Addendum 1* (Jan. 14, 2014), <http://www1.nyc.gov/assets/hpd/downloads/pdf/developers/NIHOPNCPRFQAddendum%201.pdf> [https://perma.cc/7Z6H-55WV]. See *NIHOP & NCP RFQ*, N.Y.C. HOUSING PRESERVATION & DEV., <http://www1.nyc.gov/site/hpd/developers/request-for-qualifications/nihop-ncp-rfq.page> [https://perma.cc/SV3E-3KW9] for full RFQ.

196. The tool was originally published at 596acres.org.

197. See generally TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* (MIT Press 2008).

198. See e.g., Oscar Perry Abello, *Finding the Value of a Vacant Lot by Tapping into Neighborhood Memory*, EQUITY FACTOR (Dec. 1, 2015),

agency that has jurisdiction over it, contact information for the relevant staff member at the agency, as well as information about which City Council member and Community Planning District each is in.<sup>199</sup> At the end of 2015, it had facilitated neighbors organizing to transform thirty-four empty spaces into community places.<sup>200</sup>

When HPD published its list of sites for sale, the fact that this tool allowed advocates to look up properties using the same borough, block, and lot system that the Addendum to the RFQ uses made visible community-stewarded spaces suddenly at risk. Staff at 596 Acres<sup>201</sup> checked every one of the 181 properties on the list HPD published in the RFQ against LivingLotsNYC.org, which allowed cross-referencing with existing community spaces. Within two days of the publication of the Addendum, stewards of New York City's community spaces were shocked: 596 Acres discovered that, via that list buried in an appendix, HPD had quietly offered at least twenty community garden properties, including the remaining Imani City-owned lot, to developers for purchase for one dollar (a lot cheaper than the price identical lots were offered for by the Giuliani administration in 1999 at the "surplus" real estate auction).<sup>202</sup>

Armed with a list of gardens to be lost to development inducement, New York City advocates, with 596 Acres at the forefront, were able to quickly use and expand an existing network to put community gardeners in the best position to respond to the threat long before any particular garden was actually scheduled for demolition.<sup>203</sup> To be able to respond to these "vacant" lots being offered to private for-profit builders, it was necessary to

<https://nextcity.org/daily/entry/new-york-vacant-lots-neighborhood-use-596-acres> [https://perma.cc/4DDQ-AXQW].

199. See e.g., *Imani Community Garden*, LIVING LOTS NYC, <http://livinglotsnyc.org/lot/58665/> [https://perma.cc/4KNU-KQ3Y].

200. See *2015 Annual Report*, *supra* note 168.

201. Author Paula Segal was that staff member.

202. See Tortorello, *supra* note 191. One of the authors quickly analyzed the list and found out that six of those were gardens that had formed through 596 Acres' support in the past three years.

203. See, e.g., Rebecca Baird-Remba, *Closing Bell: City to Build Affordable Housing on 122 Vacant Lots and Community Gardens*, BROWNSTONER (Jan. 15, 2015), <http://www.brownstoner.com/blog/2015/01/closing-bell-city-to-build-affordable-housing-on-122-vacant-lots-and-community-gardens/> [https://perma.cc/8T73-PGC9]; Jessica Dailey, *Affordable Housing May Replace Dozens of Community Gardens*, CURBED (Jan. 16, 2015), [http://ny.curbed.com/archives/2015/01/16/affordable\\_housing\\_may\\_replace\\_dozens\\_of\\_community\\_gardens.php](http://ny.curbed.com/archives/2015/01/16/affordable_housing_may_replace_dozens_of_community_gardens.php) [https://perma.cc/2YFX-QS64]; Pablo Gutierrez, *Proyecto Municipal de Construir Vivienda Asequibles Crea Controversia*, YOUTUBE (Jan. 16, 2015), <https://www.youtube.com/watch?v=aOYXsOWO8aA&app=desktop>; Amy Zimmer & Camille Bautista, *De Blasio's Affordable Housing Plan Could Destroy 15 Community Gardens*, DNAINFO (Jan. 16, 2015), <https://www.dnainfo.com/new-york/20150116/morningside-heights/community-gardens-threatened-by-de-blasios-affordable-housing-plan>.

connect the information about which lots were included in the published list with the information about which lots are actually being used already, as gardens and community spaces. What would have been a hidden conversation in administrative offices with developers and financiers transformed into a public discussion on the steps of City Hall, in City Council chambers,<sup>204</sup> in neighborhoods, and in the press. Stewards of community spaces demanded time and space in the public discussion about how to distribute the land that different New Yorkers viewed differently in relation to value and whether those spaces were most valuable to local communities preserved as gardens or transformed into private residences.<sup>205</sup> Not all gardeners agreed on outcomes, but all agreed that gardeners and residents of local communities had a right to the commons, a right to be part of the decision-making for the distribution of public assets.<sup>206</sup>

On December 30, 2015, the Mayoral administration announced that fifteen of the gardens offered for development were instead being transferred to the New York City Parks Department for permanent preservation as gardens.<sup>207</sup> One of the Imani lots—the City-owned one—is among those so preserved. In addition to those fifteen community-managed sites, the administration secured the land tenure of twenty-one other precarious community spaces by transferring them as well: a total of thirty-six newly-preserved community spaces emerged out of a public discussion of what New York City neighborhoods need.<sup>208</sup>

204. See, e.g., *Brooklyn Borough President Eric Adams Asks Mayor to Save Gardens*, 596 ACRES (Feb. 23, 2015), <http://596acres.org/en/news/2015/02/23/brooklyn-borough-president-eric-adams-asks-mayor-to-save-gardens/> [https://perma.cc/SC6N-E58B]; *City Council Member Inez Dickens Asks HPD Commissioner to Save Harlem Gardens*, 596 ACRES (May 25, 2015), <http://596acres.org/en/news/2015/05/25/city-council-member-inez-dickens-asks-hpd-commissioner-to-save-harlem-gardens/> [https://perma.cc/UVG7-9KYS]; *Manhattan Borough President Gale Brewer Asks Mayor to Save Gardens, Preserve Land for Community Land Trust*, 596 ACRES (Feb. 12, 2015), <http://596acres.org/en/news/2015/02/12/manhattan-borough-president-gale-brewer-asks-mayor-to-save-gardens-preserve-land-for-community-land-trust/> [https://perma.cc/6DZB-TEQ6].

205. See Letter from Gale A. Brewer, Manhattan Borough President, The City of N.Y., to Bill de Blasio, Mayor, The City of N.Y., & Vicki Been, Comm’r, N.Y.C. Dep’t of Hous. Pres. & Dev. (Feb. 10, 2015), [http://www.596acres.org/media/filer\\_public/2015/02/12/2015-02-10\\_de\\_blasio\\_bill\\_and\\_been\\_vicki\\_hpd\\_nihop\\_and\\_ncp\\_rfq.pdf](http://www.596acres.org/media/filer_public/2015/02/12/2015-02-10_de_blasio_bill_and_been_vicki_hpd_nihop_and_ncp_rfq.pdf) [https://perma.cc/38QK-F2AQ].

206. See *Council Member Robert Cornegy Asks Mayor to Save Gardens*, 596 ACRES (Feb. 10, 2015), <http://596acres.org/news/2015/02/10/council-member-robert-cornegy-asks-mayor-to-save-gardens/> [https://perma.cc/FE79-GMR5].

207. Cole Rosengren, *Brooklyn Community Gardeners React to De Blasio Admin. Deal*, CITY LIMITS (Jan. 4, 2016), <http://citylimits.org/2016/01/04/brooklyn-community-gardeners-react-to-de-blasio-admin-deal/> [https://perma.cc/X3JU-LUGM]. All six 596 Acres-facilitated spaces were on this list.

208. See *id.*

**B. If Invisible, the Potential Commons Is Always Out of Reach**

The rat-infested City-owned lot on the corner of Keap Street and South Fourth in the Puerto Rican Los Sures (Williamsburg, Brooklyn's Southside) was designated as an "Open Space" via the Urban Renewal Area Plan for the neighborhood,<sup>209</sup> adopted by New York City Council in 1992.<sup>210</sup> The plan itself has a lineage stretching back nearly half a century. Despite planning that engaged neighbors and local organizations and despite City expense to acquire and consolidate the land, the lot, designated as "Open Space," simply languished both in the neighborhood and in the City bureaucracy for twenty years.<sup>211</sup> It sat in the inventory of HPD, which also serves as New York City's local redevelopment authority (this means HPD gets urban renewal land once the planning and condemnation are complete).<sup>212</sup> This is how advocates found it in 2012, following the trail of data about municipally owned "vacant" land.

HPD has neither the mandate nor the budget to make sure that planned "Open Spaces" in its inventory become real open spaces.<sup>213</sup> As the agency name suggests, its mandate is limited to the production and preservation of places for people to live.

And so the corner of Keap and South Fourth just kept gathering weeds and trash, a potential inducement for a private developer.<sup>214</sup> A few times a year, City employees would appear to spread rat poison and collect the unwanted furniture that collected in the "Open Space" behind the fence.<sup>215</sup>

In addition to making hidden threats to community-stewarded spaces visible—as it did with the list of for-sale properties HPD published in 2015—LivingLotsNYC.org also allows advocates to transform data about potential community spaces into actionable information. In August 2012, 596 Acres posted a sign on the chain link fence surrounding a lot that is

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209. *Ribbon Cutting at Keap Fourth Community Garden in South Williamsburg*, 596 ACRES, <http://www.596acres.org/en/events/745/> [https://perma.cc/7VCE-63ST].

210. *Southside*, URBAN REVIEWER, <http://www.urbanreviewer.org/#map=17/40.7084/-73.9531&plan=Southside> [https://perma.cc/CKT8-QZET]. The plan for this Brooklyn neighborhood was created with the participation of residents and Southside Williamsburg not-for-profit organizations.

211. Paula Z. Segal, *Keap Fourth Community Garden*, LIVING LOTS NYC (Jan. 28, 2013), <http://livinglotsnyc.org/lot/58275/#note-24534> [https://perma.cc/U7GX-M8DU].

212. *See About HPD*, N.Y.C. HOUSING PRESERVATION & DEV., <http://www1.nyc.gov/site/hpd/about/about-us.page> [https://perma.cc/E9N6-6T2V].

213. *See Tortorello*, *supra* note 191.

214. Interviews with community leaders in El Puente, Jan. 2012 to Jul. 2014. Other lots in that neighborhood plan, as well as in HPD's inventory, were planned as new housing projects and those moved forward. *See e.g., Southside*, *supra* note 210. HPD's strategy for housing development is to incentivize private developers by providing free public land. *See infra* notes 269-74.

215. *Id.*

now Keap Fourth Community Garden: THIS LAND IS YOUR LAND.<sup>216</sup> The sign was an act of desperation and defiance: the lot had been planned as “Open Space” in a plan developed by an engaged community in the late 1980s, the plan had been adopted by City Council as the Urban Renewal Plan for the area in 1992, yet in 2012, it remained an uncared-for, locked, lot that collected garbage and rat bait, and where drug deals took place. The disinvestment in the space was at least partially a product of its invisibility; now that the shared asset was clearly labeled, neighbors could get to work.<sup>217</sup>

### C. Enclosure Is a Threat to All Commons

Land insecurity for gardeners manifests in the inability to preserve an existing, often vibrant and critical, community space. Land insecurity also means that gardeners and other community land stewards may not have the tools to legally access land that is or should be commons. Both are rooted in a narrative of perceived land scarcity, but also in a systemic undervaluing of collective interests. What this comes down to is that gardens are often unseen as urban space is transformed from city-as-commons into city-as-commodity.

David Harvey describes the process of creating shared value thus:

There is, in effect, a social practice of commoning. This practice produces or establishes a social relation with a common whose uses are either exclusive to a social group or partially or fully open to all and sundry. At the heart of the practice of commoning lies the principle that the relation between the social group and that aspect of the environment being treated as a common shall be both collective and non-commodified: off-limits to the logic of market exchange and market valuations.<sup>218</sup>

When applied to land, this is absurdly optimistic. The market captures the value created by people living in proximity and creating art and culture and “quality” and translates all of that into “land value.” Capturing that value interrupts the city as the commons.<sup>219</sup> As long as land can be bought, the enclosure of the *common wealth* created by people in proximity of that land is a certainty.<sup>220</sup> Even when the land purchased is a private house, its

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216. Devon Kennedy, *Vacant Lots into Community Gardens: A Profile of 596 Acres*, CITY ATLAS (June 6, 2014), <http://newyork.thecityatlas.org/lifestyle/vacant-lots-into-gardens-a-profile-of-596-acres/> [https://perma.cc/6ZEK-QD2A].

217. The sign invited neighbor participation via the 596 Acres website and a community meeting hosted by 596 Acres and El Puente’s Green Light District in January 2013. Residents who attended explained that they did not have access to the information that the lot was City-owned and could become an Open Space until they saw the sign.

218. HARVEY, *supra* note 23, at 73.

219. *See generally* Foster & Iaione, *supra* note 4.

220. *See generally* Blomley, *supra* note 1.

market value is the sum total of its context; that value (with) draws from the collaborative and parallel efforts of people other than the buyer, seller, or public entities.

The market abstracts, captures, and encloses the social capital that communities create when property is sold.<sup>221</sup> The market value reflects the monetary value of the community assets that arise from people living in proximity and developing responses to shared needs.<sup>222</sup> It may seem like a truism of the real estate industry that collective assets near a marketable “private” property make that property worth more to prospective buyers.<sup>223</sup> But, that calculation of worth is itself an enclosure: a privatization of shared labor that threatens to displace the very individuals whose labor resulted in the creation of the asset that drives prices up.

Is the neighborhood full of children playing in the street? Neighbors work together to get the vacant lot on the corner turned into a playground. (And property values go up.) Is fresh produce expensive to buy locally or simply not available? Neighbors collaborate to bring subsidized community supported agriculture to the library once a week. (And property values go up.) Is the library closed on Sundays, when most people want to use its meeting rooms and browse its shelves? Neighbors lobby the administration for better hours. (And property values go up.)<sup>224</sup>

These scenarios are exactly what David Harvey terms, “accumulation by dispossession,”<sup>225</sup> and what John Davis describes as “immoral:” the private capture of community-generated value and its transformation into individual “wealth.”<sup>226</sup>

Urban land *left* empty through disinvestment continues to present both an opportunity and a threat. The opportunity is that of creative, and often collaborative, transformation—a product of community self-determination

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221. See Foster, *supra* note 58, at 529 (stating that “[l]egal scholars have yet to fully grapple with the costs imposed on the social networks and ties, or social fabric of a community, arising from land use and development decisions.”).

222. Cf. JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES* 146-83 (Random House ed. 1961).

223. *Id.*

224. See Voicu & Been, *supra* note 54, at 267 (“Before the garden opens, prices in the immediate vicinity of the garden site are 11.1 percent lower than in the surrounding neighborhood; in the first year after opening this gap falls by 4.1 percentage points, to 7 percent. Over the five-year period after opening, the gap falls by 7.4 percentage points, to only 3.7 percent.”).

225. See generally DAVID HARVEY, *Capital Bondage*, in *THE NEW IMPERIALISM* 87-136 (Oxford Univ. Press ed. 2003).

226. John Emmeus Davis, *Common Ground: Community Led Development on Community Owned Land*, 20 *ROOTS & BRANCHES* (2015), <http://greenfordable.com/clt/wp-content/uploads/2015/05/COMMON-GROUND-JEDavis-June2015.pdf> [<https://perma.cc/G6XN-PR8S>].

with an immediate positive impact on the surrounding area. Without legal protections for land tenure, the risk is that some distal party will capture the value created by these efforts when market actors take an interest in an area or specific parcel.

### III. INTERVENTIONS TO HOLD ENCLOSURE AT BAY

The alternative—living in the midst of abandonment, disinvestment, and “distress”—is untenable. But without land security, community land stewardship itself is a risk. Certainly, neighbors standing on the street in front of a lot full of garbage, needles, and rat poison, want something better for their neighborhood; but they also certainly want some assurance that, should they put the effort into creating something better, there is some pathway to permanence and securing the land itself and to participation in decisions about which lands to abandon to the market and which to keep as commons.

That community land stewards cannot count on land security or a voice in decision-making reflects an ongoing lack of administrative awareness of complicated and overlapping claims to property. This is, in part, a failure of imagination<sup>227</sup>—the failure to see that the city itself is a “shared resource that belongs to all of its inhabitants.”<sup>228</sup> That failure has political and ethical dimensions that have, at their roots, an ongoing refusal to acknowledge “all” of these inhabitants as both having a claim over and needing to share equitably in the city and its resources.<sup>229</sup> The *true* tragedy of the city as commons is its invisibility, not its overuse.<sup>230</sup> Truly ethical urban governance systems must account for the impact of decades of neglect, must acknowledge spaces transformed as a result of community stewardship, and must make sure that the value generated by community action is only allowed to be captured and sold to private actors when the community that created that value decides that such a sale is desired.

Making existing spaces and sites of potential engagement visible and actionable, presents an opportunity to reverse racist patterns of land allocation and accumulation result current inequities. Since power, knowledge, and historical privilege have a tendency to accumulate around

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227. See Blomley, *supra* note 1, at 321 (“This reflects the prevalence of a particularly tenacious model of property that skews our analytical and political imagination.”).

228. See Foster & Iaione, *supra* note 4, at 6.

229. See Blomley, *supra* note 1, at 322 (“The analytical absence of the commons from our mental maps constitutes an analytical failure, for we miss important dimensions of urban politics. However, it may also be an ethical failure, for we can easily commit injustice.”).

230. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30 (Cambridge Univ. Press 1990), [http://wtf.tw/ref/ostrom\\_1990.pdf](http://wtf.tw/ref/ostrom_1990.pdf) [<https://perma.cc/482W-98VB>]; Blomley, *supra* note 1, at 322; Hardin, *supra* note 11.

communities and individuals with traditional access to power, reversing the trend while expanding the commons must be a conscious act and involves ensuring that people impacted by histories of violence and trauma most benefit from access to information, guidance, support, and solidarity. It comes down to a question asked by Vancouver activists when faced with the loss of their urban commons:

Does a low-income community have a right to occupy the land its members have lived on for decades? Or is the unlimited right of landowners and developers to make the best profit on the land that the free market can give?<sup>231</sup>

Understanding what is already ours and what *could* be managed as a shared resource shapes the structure of dreams, requests, and demands. The government of Bologna recognized that residents knowing which places “could be the target of action of care and regeneration” are a prerequisite to having people engage in that loving process.<sup>232</sup> Without dreams of shared resources accessible to neighbors and presented in relatable ways, requests and demands cannot emerge. Because most cities have not adopted a formal obligation to announce to the public which places invite collaboration and care, advocates must make their own invitations. Advocates use whatever information is available—from local knowledge to Open Data—to build directories of the possible and invite participation from key stakeholders.

#### **A. Make Existing Community-Stewarded Places Visible and Expose Pathways to Access**

Intervention is necessary to facilitate engagement with the city as commons and to make security in that engagement possible for individuals and communities that have invested in places despite a history of abandonment and a narrative of scarcity.

##### *1. Philadelphia, 2016*

Central Club’s status as an extra-legal land steward never hindered its vibrancy as a cohesive force in the neighborhood.<sup>233</sup> But, intervention was required to formalize Central Club’s legal connection to the land and align

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231. See Blomley, *supra* note 1, at 319.

232. COMUNE DI BOLOGNA, REGULATION ON COLLABORATION BETWEEN CITIZEN AND THE CITY FOR THE CARE AND REGENERATION OF URBAN COMMONS, § 10.6, (2014), <http://www.comune.bologna.it/media/files/bolognaregulation.pdf> [https://perma.cc/SGG7-Q5T8].

233. CENT. CLUB FOR BOYS & GIRLS, <https://centralclubforboysandgirlsphilly.wordpress.com/> [https://perma.cc/Y3AE-3CWN].



it with the lived experience of people on Alter Street.<sup>234</sup> Facing post-tax foreclosure sales of multiple parcels, Central Club, with legal counsel from the Garden Justice Legal Initiative (GJLI), appeared before the Philadelphia Court of Commons Pleas to tell Mrs. Wilson's story and request a postponement of the sales.<sup>235</sup> The court obliged, allowing Central Club to take the time granted to seek a nonprofit real estate tax exemption going back to 1978.<sup>236</sup> Central Club succeeded by showing the Philadelphia Board of Revision of Taxes (BRT) eight decades of photos demonstrating the Club's role as land stewards.<sup>237</sup> In 2012, the court and the BRT worked *with* Central Club to rewrite history, retroactively declaring the organization to have long been the bona fide nonprofit owner of the property and providing a pathway for the organization to participate in the determination of the future of the value it had created.<sup>238</sup>

Like Central Club, the majority of Philadelphia's hundreds of community-managed gardens and open spaces operate without legal permission.<sup>239</sup> Unlike Central Club, those able to establish legal rights to land using the traditional law governing private property are few. However, other claims and other strategies hold promise for putting community in control of land disposition, including asserting rights under the public trust doctrine<sup>240</sup> (as was done in New York City)<sup>241</sup> and preserving public access to public land or preserving land through establishing not-for-profit community land trusts to hold title to community assets.<sup>242</sup>

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234. Valerie Russ, *Grays Ferry Community Garden Wins a Reprieve*, PHILA. DAILY NEWS (May 16, 2012), [http://articles.philly.com/2012-05-16/news/31727728\\_1\\_tax-exempt-status-vacant-lots-grays-ferry](http://articles.philly.com/2012-05-16/news/31727728_1_tax-exempt-status-vacant-lots-grays-ferry).

235. Defendant's Petition to Stay Execution, *supra* note 13.

236. See Lauren Hertzler, *Year in Review 2012: Rescue*, S. PHILLY REV. (Dec. 27, 2012), <http://test.callowayproject.com/2012/dec/27/Year-in-Review-2012-Rescue-184860471/> [<https://perma.cc/K9PL-8552>].

237. Myers, *supra* note 12.

238. See Esposito, *supra* note 81.

239. *Id.*

240. One, as yet, untested legal route might be to ask the court to require the Commonwealth of Pennsylvania and its municipal governments to live up to their state constitutional mandate to protect the public trust on behalf of "all the people," equitably and for the benefit of future generations. See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 985 (Pa. 2013) (plurality opinion) (stating that Pennsylvania has a state constitutional duty to serve as trustee of the state's "public natural resources").

241. See City Respondents' Memorandum of Law, *Coney Island Boardwalk Cmty. Garden v. City Of New York*, No. 6033 (Kings Co. Sup. Ct. 2014) [<https://perma.cc/S9JY-N9X7>].

242. The Neighborhood Gardens Trust, Philadelphia's community garden land trust, is one of many around the country that preserve community garden and open spaces in perpetuity, taking the land out of the market permanently. See *About the Neighborhood*

To make pathways to securing the land visible, in the face of potential enclosure, activists first needed to know the places in need of preservation.<sup>243</sup>

In Philadelphia, during the summer of 2012, GJLI began a garden data collection process.<sup>244</sup> Building on existing data from the Vitiello and Nairn 2008 study,<sup>245</sup> GJLI used its relationships, crowd sourcing, and neighborhood-based ground-truthing to begin mapping the physical scope of Philadelphia's existing stewarded spaces, and to meet its land stewards in person and understand their histories and current needs.<sup>246</sup> Pairing on-the-ground and web-based strategies, GJLI soon had a database of facts about places.<sup>247</sup> Now, GJLI staff could alert gardeners to spaces at risk and connect them with pathways to legal access. Additionally, GJLI had the context to work with gardeners as advocates in removing decades-old barriers to land tenure.<sup>248</sup>

The Pulaski Zeralda Garden in Northwest Philadelphia and the Early Bird Farm in South Philadelphia are two places that were put on the preservation pathway through visibility. The Pulaski Zeralda has been "the only spot of green" on a block of row houses for twenty-five years.<sup>249</sup> Early Bird Farm is a newer market farm in one of Philadelphia's most rapidly gentrifying neighborhoods.<sup>250</sup> GJLI cross-referenced City-owned

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*Gardens Trust*, GROUNDED IN PHILLY, <http://www.groundedinphilly.org/pathways/about-neighborhood-gardens-trust/> [https://perma.cc/ZZ8A-GGLK].

243. Christopher Weber, *Counting the Harvest: How Numbers Can Save Urban Gardens*, GRIST (Aug. 28, 2012), <http://grist.org/food/counting-the-harvest-how-numbers-can-save-urban-gardens/> [https://perma.cc/Y4PZ-5U27].

244. See generally VITIELLO & NAIRN, *supra* note 62.

245. A key finding of the Harvest Report was the vulnerability of garden spaces due to barriers to land tenure. See VITIELLO & NAIRN, *supra* note 62, at 39.

246. See generally Weber, *supra* note 243.

247. By December 2012, GJLI had launched a collaboration with 596 Acres to create [www.GroundedinPhilly.org](http://www.GroundedinPhilly.org), a web-based mapping and organizing site aimed at both bringing visibility to the breadth of existing urban commons—gardens, farms, and community-managed open spaces—and make transparent publicly owned and abandoned private vacant spaces and associated pathways to legal access. See e.g., Adrien Schless-Meier, *K(no)w Vacancy: From NY to PA, Urban Land Maps Support Reclaiming Abandoned Lots*, CIV. EATS (July 26, 2013), <http://civileats.com/2013/07/26/know-vacancy-from-new-york-to-philadelphia-urban-land-maps-support-communities-in-reclaiming-abandoned-lots/> [https://perma.cc/R8AQ-W48R].

248. *Id.*

249. PUB. INTEREST LAW CTR. OF PHILA., GARDEN JUSTICE LEGAL INITIATIVE PROGRAM REPORT 2011-2013, at 7, (quoting garden leader Dee Risher), [http://www.pilcop.org/wp-content/uploads/2012/06/Garden-Justice-Legal-Initiative-Two-Year-Report\\_Final.pdf](http://www.pilcop.org/wp-content/uploads/2012/06/Garden-Justice-Legal-Initiative-Two-Year-Report_Final.pdf) [https://perma.cc/U8UE-SM74].

250. Earni Young, *The Issues That Can Divide a Changing Neighborhood*, PHILLY.COM, [http://www.philly.com/philly/news/Gentrification\\_in\\_Philadelphia.html](http://www.philly.com/philly/news/Gentrification_in_Philadelphia.html) [https://perma.cc/2RUR-M5MC]

properties listed for sale on the city's Philly Landworks website<sup>251</sup> with existing garden data.<sup>252</sup> Pulaski Zeralda and Early Bird Farm were up for sale to any bidder, along with sixty-eight other gardens and farms.<sup>253</sup> Armed with that information, GJLI visited each one of these seventy at-risk spaces,<sup>254</sup> speaking directly with as many gardeners as could be found, and leaving at every site laminated detailed instruction about the garden's status and the most effective places to begin the pathway to preservation, including submitting an expression of interest to the land-holding agency and asking for assistance from the district councilperson.<sup>255</sup> Pulaski Zeralda immediately began a process of preservation by the local community garden land trust, while the Early Bird farmers purchased their farm lot directly from the City,<sup>256</sup> so that the farmers now hold the deed themselves.<sup>257</sup>

The following year, GJLI again used data to make at-risk gardens visible, once again in the context of a rezoning proposal that would, if adopted, have restricted gardening to only some parts of the city. Within months of the new zoning code going into effect,<sup>258</sup> a district council member introduced legislation intended to roll back efforts to legalize urban agriculture<sup>259</sup> through an outright ban on community gardening, and market farming in commercial mixed-use areas.<sup>260</sup> This legislation, in banning gardening and farming on about one-third of commercial land, would have put about 20% of Philadelphia's gardens and farms at risk of

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251. See generally *Philly Landworks*, CITY OF PHILA., <https://secure.phila.gov/PAPLPublicWeb/Landing.aspx> [<https://perma.cc/CG5R-4LNA>].

252. Cahn, *supra* note 149, at 5.

253. *Id.*

254. Samantha Melamed, *Room to Grow*, PHILA. INQUIRER (July 25, 2014), [http://articles.philly.com/2014-07-25/food/51956615\\_1\\_west-philadelphia-gardeners-sheriff](http://articles.philly.com/2014-07-25/food/51956615_1_west-philadelphia-gardeners-sheriff) [<https://perma.cc/YM5X-BJ6R>].

255. See generally THE PEW CHARITABLE TRS., PHILADELPHIA'S COUNCILMANIC PREROGATIVE: HOW IT WORKS AND WHY IT MATTERS (2015), [http://www.pewtrusts.org/~media/assets/2015/08/philadelphia-councilmanic-report—with-disclaimer.pdf](http://www.pewtrusts.org/~media/assets/2015/08/philadelphia-councilmanic-report-with-disclaimer.pdf) [<https://perma.cc/TWK6-EH2U>] (detailing the role of council members in land disposition).

256. Kellie Patrick Gates, *New Gardens, New Tools, and a Summer Garden Tour*, PLANPHILLY (May 22, 2014), <http://planphilly.com/articles/2014/05/22/new-gardens-new-tools-and-a-summer-garden-tour> [<https://perma.cc/BQR3-VEX2>].

257. See Interviews, *supra* note 84.

258. See generally PHILA., PA., CODE tit. 14 (2012).

259. See *id.* at § 14-601(11), Table 14-602-1.

260. Christine Fisher, *Councilman O'Neill's Amendments Hit Community Gardens*, PLANPHILLY (Jan. 17, 2013), <http://planphilly.com/articles/2013/01/17/councilman-o-neill-s-amendments-hit-community-gardens> [<https://perma.cc/F2L4-5XSB>].

being in areas where gardening would be forbidden.<sup>261</sup> Having key information about the impact of the bill made urban agriculture visible in the media and in city council chambers.<sup>262</sup> Within a month, the ad-hoc Coalition for Healthier Foods and Greener Spaces, with threatened gardens and farms at the fore, convinced city council members to remove from the bill any provisions negatively affecting urban agriculture.<sup>263</sup> And out of that ad-hoc organizing effort, a more formal garden and farm coalition was born, now called Soil Generation.<sup>264</sup>

In the spring of 2015, GJLI used garden data, again, this time to mitigate the impact of the City of Philadelphia's tax lien securitization.<sup>265</sup> The revival of the largely failed 1997 policy, the City announced intent to use property tax debt, once again, as collateral to raise short term funds by selling 1400 tax liens to private investors.<sup>266</sup> GJLI knew from experience with Central Club that privatized debt creates an additional barrier to transferring abandoned land into new ownership, including for garden preservation. GJLI pushed back with other advocates, reminding city officials that "properties whose liens were sold [in 1997] remained in limbo for years and unavailable for redevelopment because tax balances continued to be uncollectible."<sup>267</sup>

Advocates cross-referenced garden data with the tax lien pilot list: a list of properties to be included in a pilot sale of tax debt. Five active gardens were on the list, including one GJLI client, and a non-profit garden and

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261. John McGoran, *Zoning Amendment Threatens Urban Farms in Philly*, GRID (Jan. 18, 2013), <http://www.gridphilly.com/grid-magazine/2013/1/18/zoning-amendment-threatens-urban-farms-in-philly.html> [https://perma.cc/64EL-VBA4].

262. See generally *id.*; Fisher, *supra* note 260; Virginia Smith, *And You Thought Gardening Was a Passive Sport*, PHILA. INQUIRER: GARDENING (Jan. 17, 2013), <http://www.philly.com/philly/blogs/gardening/And-you-thought-gardening-was-a-passive-sport.html> [https://perma.cc/8T6B-3NV4].

263. Fisher, *supra* note 260.

264. See *Soil Generation!*, GROUNDED IN PHILLY, <http://groundedinphilly.org/HFGS-about/> [https://perma.cc/9G7T-CJWZ] ("Soil Generation is a coalition of Philadelphia organizations and individuals who support equity and social justice for community-managed green space, gardens, and farms through advocacy, grassroots organizing, and community education.").

265. Esposito, *supra* note 81.

266. Bill Hangley, *Philadelphia to Auction off Property Tax Debts Despite Criticism from Community Groups*, NEWSWORKS (June 24, 2015), <http://www.newsworks.org/index.php/local/homepage-feature/83398-philadelphia-to-auction-off-property-tax-debts-despite-criticism-from-community-groups> [https://perma.cc/L3BD-KAFV].

267. Claudia Vargas, *Phila. Readies to Auction 938 Tax Liens*, PHILLY.COM (June 25, 2015), [http://articles.philly.com/2015-06-25/news/63787691\\_1\\_tax-lien-sale-tax-delinquents-city-schools](http://articles.philly.com/2015-06-25/news/63787691_1_tax-lien-sale-tax-delinquents-city-schools) [https://perma.cc/VY97-JERH].

nature center that had just applied for and received a nonprofit real estate tax exemption.<sup>268</sup>

Informed of these inclusions and warned about the disruptions to communities that would ensue should the debt sales go forward, Philadelphia officials removed these properties from the list.<sup>269</sup> Publicizing the list and pending lien sale also put gardeners on notice.<sup>270</sup> They too came forward to prevent tax lien sale of their spaces.<sup>271</sup>

Building visibility for existing gardens has meant that others besides advocates are paying attention. In 2016, a staff member from the city's private tax collection firm flagged a garden when cross-referencing parcels headed for foreclosure action.<sup>272</sup> It is part of a large network of gardens serving Philadelphia's Bhutanese and Burmese refugee population.<sup>273</sup> This is a garden that may now not be sold. In the struggle to preserve the city as commons, gardeners are visioning a changing city and making that vision seen and heard, most recently representing a "richly diverse" Philadelphia at City Council hearings on urban agriculture.<sup>274</sup> And, in the midst of it all, Central Club prepares its 70th Harvest Fair.<sup>275</sup>

## 2. *New York, 2016*

Announcing public land as an opportunity for neighborhood engagement in New York City allows people to not only engage with the land itself and each other, but also with the political process. The space that became Keap Fourth Community Garden sat waiting until neighbors, working together and in response to the specific information about the sign 596 Acres posted on its fence, were able to manifest the "planned" open space by creating a community garden. In June 2014, two years after the sign posted by 596

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268. See Claudia Vargas, *Community Groups Cry Foul over Upcoming Tax Lien Sale*, PHILA. INQUIRER (June 22, 2015), <http://www.philly.com/philly/blogs/heardinthehall/Community-groups-cry-foul-over-upcoming-tax-lien-sale.html> [https://perma.cc/PBT6-TAGU?type=image].

269. See E-mail correspondence between author and Amy Laura Cahn [https://perma.cc/ZLN5-VRQV].

270. See Vargas, *supra* note 259.

271. See *id.*

272. See *id.*

273. Marianne Lavelle, *This City Turns Brown into Green, Just as the Pope Wishes*, NAT'L GEOGRAPHIC (Sept. 25, 2015), <http://news.nationalgeographic.com/2015/09/15925-pope-francis-Philadelphia-environment-green-space-gardens-immigrants/> [https://perma.cc/EN9B-NJVH].

274. Catalina Jaramillo, Urban agriculture leaders ask for citywide commitments to garden preservation and creation, PlanPhilly (September 23, 2016) <http://planphilly.com/articles/2016/09/23/urban-agriculture-leaders-ask-for-citywide-commitments-to-garden-preservation-and-creation>.

275. See Interviews, *supra* note 84.

Acres went up on the lot, the ribbon was finally cut on the Keap Fourth Community Garden. Shortly before, the lot had finally been transferred to the Parks Department.<sup>276</sup> Neighborhood parents, a Latino-youth-led “Green Light” district campaign, and the daycare center next door came together to gather the support needed to force the city agencies to do what was planned. They collected hundreds of petition signatures, dozens of letters of support from businesses and nonprofits, and came up with a layout for the space and a plan to build it using a combination of City and philanthropic resources; all of that, just so twenty-two years after a City-sanctioned plan for a new Open Space in the neighborhood it could become a reality.<sup>277</sup>

The key to identifying the lots that became the Keap Fourth garden as a place simply waiting to become the target of care and regeneration was unearthing and reviewing the over 150 comprehensive neighborhood master plans adopted by the City of New York under the Urban Renewal umbrella.<sup>278</sup> These plans have existed in paper form in HPD offices, but have been historically inaccessible to the public.<sup>279</sup> Over 100 hours, a team of trained volunteer records inspectors examined each plan and listed all the lots that were included in it, again using numbering system that the City uses.<sup>280</sup> Where possible, they included the dispositions that were promised where those were available—which lots were envisioned as (or promised to be) “open space,” which were planned to be “commercial,” and which were planned to be “residential.”<sup>281</sup> Thus, unfulfilled promises became visible as once and future commons and exposed clear opportunities for today’s residents to pick up where their predecessors had been left behind by the

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276. See BWW News Desk, *NYC Parks Cuts Ribbon on Keap Fourth Garden in Brooklyn*, BROADWAYWORLD.COM: BROOK. (June 4, 2016), <http://www.broadwayworld.com/brooklyn/article/NYC-Parks-Cuts-Ribbon-on-Keap-Fourth-Garden-in-Brooklyn-20140604> [<https://perma.cc/8XDM-3XS2>].

277. Another space, Hooper Park, also planned as “Open Space” for South Williamsburg in the plan adopted in 1992, sits waiting to this day. Neighbors saw signs in 2012 and started galvanizing support to manifest the planned park amenity. In 2016, after “careful review,” New York City’s Department of Housing Preservation and Development approved the transfer of the land away from their jurisdiction where it had been languishing for twenty-four years; New York City Parks has yet to accept jurisdiction, and Hooper Park continues to wait in the wings, as it has since residents conceived it in the late 1980s and extracted the City’s commitment via its inclusion in the Southside Urban Renewal Plan.

278. *Reviewing Past Urban Plans > Discovering Present Impact > Supporting Future Actions*, URBAN REVIEWER, <http://www.urbanreviewer.org/#map=12/40.6904/-73.9627&page=about.html> [<https://perma.cc/5X9D-GU7E>].

279. *Id.*

280. *Id.*

281. *Id.*

City employees charged with stewarding “Urban Renewal” planning and execution.<sup>282</sup>

Unlike in cities where purchase of most public land is available to all-comers, the disposition of public land in New York is usually done through a process insulated from New Yorkers outside of the politics and development communities.<sup>283</sup> Opening the conversation about how public land is distributed and development encouraged is a distinctly democratic project; it is an invitation to residents to witness and take part in a typically closed-door process.

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Despite the NYRP rescue from Giuliani’s surplus auction and the grassroots success of getting the remaining City lot transferred to the New York City Parks Department for permanent preservation as a garden, Imani remains un-secured. Another invisible transaction threatens to tear the garden apart: the sale of the approximately \$3200 in tax arrears accrued in 2003 because neither the Imani Not for Profit, nor NYRP filed for tax abatement or paid the taxes in the year after NYRP took over garden management.<sup>284</sup> The debt was purchased as part of a securitized lien sale and, in 2004, the buyer initiated foreclosure.<sup>285</sup> By 2015, when the foreclosure was decided via a default judgment, the original debt, plus interest and fees, had grown to \$165,000.<sup>286</sup> A referee sold the 20’ x 100’

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282. The Urban Renewal research is now on the web at [www.urbanreviewer.org](http://www.urbanreviewer.org), and has been incorporated into 596 Acres’ community land access advocacy workflow.

283. See generally *Opportunities for Developers*, NYC HOUSING PRESERVATION & DEV., <http://www1.nyc.gov/site/hpd/developers/opportunities.page> [https://perma.cc/4BZR-9P9G]. New York’s highly political public land-disposition process serves as a buffer to the market forces that would otherwise overpower neighbors once information about land was available.

284. See *Tr. & Bank of N.Y. v. Imani Cmty. Hous. & Revitalization Comm., Inc.*, No. 20423/2004 (Kings Co. Sup. Ct. 2004).

285. Selling tax debt to private collectors who finance the purchase via bonds has been New York City policy continuously since 1996. “In 1996, Mayor Giuliani decided to stop taking buildings [and lots] *in rem*. Instead, the city would place tax and water liens, a right to seize possession of the property (as well as emergency repair liens, in which a landlord fails to repay the city for intervening in hazardous conditions) against a building [or lot] and then, after a period of staged warnings, sell the liens to a servicer, which would then package the liens and sell them as investments. In this way, the city would get its money up front, and privatize the question of what happened to the buildings [lots]—and their tenants.” Krinsky, *supra* note 120. The New York City Department of Finance has sold about 2500 notes in the lien sale over three years, 2012-2014, for properties that have no buildings on them.

286. See *Tr. & Bank of N.Y. v. Imani Cmty. Hous. & Revitalization Comm., Inc.*, No. 20423/2004 (Kings Co. Sup. Ct. 2004).

property in the middle of the garden for \$365,000<sup>287</sup> to a buyer who listed it for sale for \$690,000.<sup>288</sup> The buyer has initiated an eviction proceeding.<sup>289</sup>

## CONCLUSION

Visibility can be a tool to advance the city as commons and engage in a dialogue about what and who we value in our cities. This dialogue relies on a willingness to ask questions that bring to light historic inequities. To whom are resources, information, places, or even people visible? Which people find themselves at the centers of power and, thus, benefit from access to information? To whose goals is information tailored?

Existing and potential land stewards so often lack power to decide what is to be fenced, who gets keys, and what is best left open, and are at a further distance from decision making about how to distribute boundaries.<sup>290</sup> Interventions and innovations aimed at raising visibility of land stewards and stewarded spaces—whether they involve legal or data tools or policy change—must be oriented towards shifting power into the hands of people most impacted by them, especially those who have been disconnected from power over land for generations.

### A. Root the Work in the History of the Place

Neither land nor people are fungible. Communities of people have connections to places built over generations. Disinvestment, ongoing land insecurity, and ensuing displacement create trauma that only builds on patterns of race-based urban policy and practices that have inflicted trauma on marginalized communities in cities throughout the twentieth century.<sup>291</sup> It is in this context that it is crucial to ask the question “Who is the City for?” In the words of Bronx-based Black farmer Karen Washington:

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287. N.Y.C. DEP'T OF FIN., OFF. OF THE CITY REG., REFEREE'S DEED (2015), [http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc\\_id=2015090900598001](http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015090900598001) [<https://perma.cc/4NJM-WLLK?type=image>].

288. See *Imani I Community Garden*, LIVING LOTS NYC (Jan. 25, 2016), <http://livinglotsnyc.org/lot/58665/#photo-3274> [<https://perma.cc/Z2S8-JPJZ>].

289. *Herman Stark v. Imani Cmty. Hous. & Revitalization Comm., Inc.*, No. 101265/2015 (Kings Cty. Civ. Landlord Tenant Ct. 2015); see *Imani I Community Garden*, *supra* note 288.

290. For a truly just governance model for these commons, the invitation must be extended to those who actually work the land, whether in collectives or as individuals, and to those local, who benefit from that work (or suffer because of it). Such an invitation would reflect the reality that “the patterns of who used these spaces and of distribution of food from these gardens often extended well beyond the gardeners’ households.” VITIELLO & NAIRN, *supra* note 62.

291. See MINDY THOMPSON FULLILOVE, *ROOT SHOCK* 114 (One World Books, 2004).



[T]he movement wasn't about urban agriculture, it was about survival, taking back our communities . . . [n]ow you have people coming into gardens that have established histories, that were built on the backs of people who made it safe for you to come in, and you're gonna talk about urban agriculture? You cannot leave out . . . the history and the legacy of the elders who were there long before so you can do whatever you wanna do.<sup>292</sup>

A renewed national dialogue about racism, particularly anti-Black racism and systemic violence enacted against Black people and communities, *should* make ignoring these considerations anachronistic.<sup>293</sup> It has not.

As attention is paid to resolving the short-term legal access and long-term tenure issues of the urban farmers, entrepreneurs in open space, and community gardeners, the key is establishing the rights of and opportunities for the people who both lived through the period of institutional disinvestment in their neighborhoods and responded by investing their own social and financial capital into community spaces. Community land stewards need mechanisms to facilitate the preservation and long-term sustainability of places. Invitations to new residents bringing new ideas are also needed, but not at the expense of the tenure of those whose labor has made the neighborhoods viable for decades.

Institutionalization of spaces carries with it its own risks. Creating nonprofits that hold title to community spaces or adopting policies and pathways to increase legal access to land will not be enough to protect the city as a commons if these institutions, policies, and pathways are not led or informed by or benefiting the communities most affected or best positioned. Rights-based approaches through which policy and practice are informed by an acknowledged history of racial inequity can serve as counter-weight to innovation that threatens to “protect” space while simultaneously erasing its history.<sup>294</sup>

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292. Patrick Crouch, *Evolution or Gentrification: Do Urban Farms Lead to Higher Rents?*, GRIST (Oct. 23, 2012), <http://grist.org/food/evolution-or-gentrification-do-urban-farms-lead-to-higher-rents/> [<https://perma.cc/6S3F-LDU9>].

293. See Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, THE FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> [<https://perma.cc/75AA-PQ9F>] (“When we say Black Lives Matter, we are talking about the ways in which Black people are deprived of our basic human rights and dignity. It is an acknowledgement Black poverty and genocide is state violence.”); see also Coates, *supra* note 36.

294. See MINDY THOMPSON FULLILOVE, *URBAN ALCHEMY* (New Village Press, 2013). See generally *Race and Social Justice Initiative (RSJI)*, SEATTLE.GOV, <http://www.seattle.gov/rsji> [<https://perma.cc/CFX6-UCGP>] (“The Race and Social Justice Initiative (RSJI) is the City’s commitment to eliminate racial disparities and achieve racial equity in Seattle.”).

### **B. Counter Narratives About Urban Spaces**

In an enthusiasm to spur investment, cities often fail to acknowledge history and, with that history, the policies that spurred disinvestment and abandonment in the first place. Twentieth-century history is clear: these policies disproportionately impacted African-American, immigrant, and refugee communities for years. Just as using the terms “vacant” or even “interim” make the ongoing work of existing land stewardship invisible, the use of the term “urban blight,” often as synonymous with vacant or abandoned land, reveals how disconnected the dialogue is from historic inequity.<sup>295</sup>

Decontextualized from its racialized origins, calling a neighborhood “blighted” erases the public policies and private actions that predicated the neighborhood’s current conditions, and shifts blame to current residents. Calling a neighborhood blighted makes invisible the actions taken by communities to address terrible conditions. This term, too, perpetuates the invisibility of land stewarded spaces.

In centering the conversation on existing relationships to place, we question common and unhelpful narratives associated with abandoned land. In this Article, the stories of Alter Street and Imani demonstrate how thoroughly it discounts and discredits urban land stewards to call them “interim” or the land they care for “vacant” or “blighted.” If we see these deep roots, can we not see how traumatic it is to pull them?

Different language is the first step on a road to systemic change. Municipalities, residents, and advocates need to learn to “see” the spaces that matter to communities. When looking at a “vacant” lot, residents need to understand what its ties are to current administrators, past plans, and uses, and how they have a voice in what happens next.

And when initiating a process that will impact a community-stewarded space in a neighborhood, city administrators need to understand the value and use of that space locally and see it for more than just a place where no building has (yet) been built.

### **C. Be Explicit About Race and Equity, Leverage Privilege, and Support People of Color in Leadership**

Even as cities encourage a new generation of often young and white urban farmers to put vacant land into productive reuse, policies and programs fail to recognize the communities of color who stewarded abandoned spaces for generations, growing food and creating community.

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295. See generally Troutt, *supra* note 30.

Strategies and policies in service of the city as commons must come from and be guided by grassroots efforts. They must be informed directly by what is happening on the ground, as well as by what came before. Otherwise “New Urbanism,”<sup>296</sup> urban agriculture, and all the hopeful efforts to facilitate resident-led creation of neighborhood amenities and activation of “vacant” spaces will simply be further systems of exclusion and enclosure that perpetuate race-based injustice beneath a veneer of localism.<sup>297</sup>

In simple terms, we need to continue to emphasize that the question of “commons for whom” is explicitly a question of racial equity in this country. And we need to support the increasingly robust Black-led support of land and food justice. These are the voices that must set the terms.<sup>298</sup>

#### **D. Ensure Voices of Land Stewards Are at the Center**

Law, policy, and data are languages and tools to facilitate visibility, access, and preservation. They do not ensure that gains are equitably felt. Nor are the tools themselves or the information provided through them accessible to all. A sign on the fence, a laminated notice, a community meeting, and a phone tree are each as critical as law, policy, and data. And more important than each of those are the relationships that we build.

Strategies for making information about key places visible are vital to decentralizing the power to govern among individuals, organizations, and formal organs of government. Decentralized power means including a broader swath of people in decisions about the distribution of life-enhancing elements in cities, which are really decisions about life quality

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296. New Urbanism is “a movement designed to generate more compact development . . . focused on architecture and community design. New Urbanism calls for more human scale, walkable streets, the mixing of shops and residence in the urban center designed to generate city life, and a higher density, less automobile-dominated community.” James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL’Y 45, 48 (2003).

297. See MIKE DAVIS, *CITY OF QUARTZ* (Verso, 1990) (“[T]he most powerful ‘social movement’ in contemporary Southern California is that of affluent homeowners, organized by notional community designations . . . engaged in the defense of home values and neighborhood exclusivity.”). This, too, could be viewed as the governance of commons. Cf., OSTROM, *supra* note 230 (“[C]ommunities of individuals have relied on institutions resembling neither the state nor the market to govern some resource systems with reasonable degrees of success over long periods of time.”).

298. See NATASHA BOWENS, *THE COLOR OF FOOD* (2015); see also *What Is the Black/Land Project?*, THE BLACK/LAND PROJECT, <http://www.blacklandproject.org/> [<https://perma.cc/FLL3-9MPD>] (“Black/Land gathers and analyzes stories about the relationship between black people, land, and place.”).

and longevity.<sup>299</sup> But that decentralization alone, while a key feature of collaborative commons-oriented governance, does not mean that justice goals are attained or that centuries of racism, displacement from land, and disenfranchisement from decisions about key resources, have been undone.

Imbuing the city's decisions with the language of the "commons" forces a city to consider "rights, entitlement and justice."<sup>300</sup> In relation to land—whether vacant or otherwise—under this framework every city is forced to weigh one party's rights (i.e. a private developer) against the rights of existing residents already using space (i.e. community gardeners and their neighbors).<sup>301</sup>

Tools for shifting power to existing communities should be informed by the history of decisions about places in the city made at a distance. What would our models for preservation look like, if they were *designed* to keep power in community hands, while guarding against vulnerabilities? They would place control in hands of people of color, encourage broad community participation, be based on cultural traditions that inform growing practices, and encourage mutual aid and self-determination.

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299. See generally Pablo Pampillo & Juan Baliño, *The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New IUS Commune*, 17 ILSA J. INT'L & COMP. L. 517, 540 (2011).

300. Blomley, *supra* note 1, at 325.

301. See *id.* at 325-26.